9/Case No. 395

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 395 REPORT OF CASE DECISIONS September 30, 1986

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UNFAIR LABOR PRACTICE CASES

23 FLRA No. 68 (September 29, 1986)

Portsmouth Naval Shipyard and Department of the Navy (Washington, D.C.) and International Federation of Professional and Technical Engineers, Local 43, AFL-CIO-CLC, Case No. 1-CA-30290

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23 FLRA No. 69 (September 29, 1986)

American Federation of Government Employees, Local 1631 and Veterans Administration Medical Center, Chillicothe, Ohio (Immundo, Arbitrator), Case No. 0-AR-1172

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Federal Labor Relations Authority

23 FLRA No. 68

Portsmouth Naval Shipyard
and Dep't of the Navy
(Wash., D.C.) and IFPTE,
Local 4, Case No. 1-CA-30290
(Decided September 29, 1986)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practice
  - Agency Violations
    - Discrimination
      - Access to Administrative Grievance Procedure
        - Union Members Denied Access
      - 5 CFR § 771.204 Does Not Allow Agency to Discriminate Among Employees
    - Interference, Restraint, Coercion
      - Statement
        - Union Members Denied Access to Administrative Grievance Procedure
  - Procedure
    - Jurisdiction
      - Matter Not Barred by § 7116(d)
        - Issues In Complaint Differ From Issues In Grievance
    - Timeliness
      - Complaint Not Time-Barred
        - Unlawful Rule Maintained Throughout 6-Months Prior to Filing
  - Remedy
    - Reinstate and Process the Grievance
- 5 CFR § 771.204(b)

STATUTE

7102
7103(a)(14)
7116(a)(1) and (2)
7116(d)
7118 and 7118(a)(4)
7121(a)

DIGEST NOTES

The Authority held that it is a violation of § 7116(a)(1) and (2) to deny employees access to an administrative grievance procedure because they are represented by a union in an appropriate unit and covered by a collective bargaining agreement. The administrative grievance procedure is a condition of employment as it is a personnel matter or practice established by rule or regulation for resolving disputes affecting employee working conditions. Section 7116(a)(1) and (2) clearly prohibits discrimination between unit and non unit employees with respect to conditions of employment based solely on bargaining unit

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status. There is no indication in the Statute or its legislative history that Congress intended for there to be any exceptions to this prohibition other than those which derive from the Statute itself. While 7121(a)(1) provides, with certain exceptions, that the grievance procedures of a collective bargaining agreement are to be the exclusive procedures for resolving grievances which fall within its coverage, it does not prohibit employees from using the agency grievance procedure to raise issues outside the scope of the negotiated grievance procedure. Thus, while the Statue does not mandate the scope of an administrative grievance procedure, once such a grievance procedure is established, unit employees may not be denied access to it solely on the basis of their status as members of a unit covered by a collective bargaining agreement.

The agency violated § 7116(a)(1) when it informed an employee that since he was represented by the union and covered by a collective bargaining agreement, he could not utilize the agency's administrative grievance procedure. The Authority held that the statements would reasonably be expected to cause a unit employee to conclude that he was being denied access to the agency grievance procedure, a privilege available to nonunit employees, solely because his exclusive representative successfully negotiated a collective bargaining agreement. The statement would discourage the exercise of an employee's protected right to engage in collective bargaining.

Section 5 CFR § 771.204 does not permit an agency to discriminate among its employees. OPM's regulations permit agencies to extend the coverage of the agency grievance procedure to bargaining unit employees to the extent consistent with the provisions of § 7121. That is, to the extent such matters do not fall within the coverage of the negotiated grievance procedure, they may be contested through administrative procedures. Nothing in the regulation permits the agency to deny access to unit employees for matters with are not covered by the negotiated procedure.

Federal Labor Relations Authority

23 FLRA No. 69

AFGE, Local 1631 and VA Medical Center, Chillicothe, Ohio (Immundo, Arbitrator), Case No. 0-AR-1172 (Decided September 29, 1986)

SUBJECT MATTER INDEX ENTRIES

Arbitration
- Exceptions Asserted in Appeal
  - Award Contrary to Law and Regulation
    - Arbitrator Failed to Grant Retroactive Temporary Promotion and Backpay
- Temporary Promotion
  - Higher Graded Position
    - Employee Must Meet Minimum Qualification Requirements

STATUTE

7122(a)

DIGEST NOTES

The issue presented at arbitration was whether management had violated the parties' collective bargaining agreement by not temporarily promoting the GS-3 graded grievant to a GS-5 position. The arbitrator found that the grievant had satisfactorily performed some of the duties of the GS-5 position for a 10-month period and concluded that by not detailing the grievant to the higher-graded position, management violated the spirit of a provision of the parties' agreement relating to equitable, nondiscriminatory treatment of employees. However, the arbitrator further found, that the grievant was not eligible for promotion to GS-5 under civil service qualification standards. The arbitrator therefore concluded that management did not violate applicable provisions of the parties' agreement by not temporarily promoting the grievant. Finding that no remedy could be applied for a violation of the spirit of a provision of the parties' agreement, the arbitrator denied the grievance.

In its exception to the arbitrator's award, the union contended the award is deficient because the arbitrator failed to award the grievant a retroactive temporary promotion and backpay for the period of time he found that the grievant was assigned duties for a GS-5 position. The Authority held that the exception failed to establish that the award was contrary to law or regulation. To the contrary, the award was strictly in accordance with civil service law and regulation. The Authority

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

has recognized that in order or an employee to be properly promoted consistent with civil service law and regulation, whether temporarily or permanently, the employee must meet at the time of the promotion the minimum qualification requirements for the position to which the employee is to be promoted. The arbitrator specifically found that the grievant did not meet the minimum qualification requirements for promotion to GS-5.

23 FLRA No. 70

Overseas Federation of
Teachers and DOD Dependents
Schools, Mediterranean
Region, Case No. 0-NG-999
(Decided September 29, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Negotiability	7117(c)

Procedure
  Timeliness
    Agency Refusal to Provide Allegation of Nonnegotiability
      Fifteen-Day Time Limit Inapplicable
      Request Concerned Subject of Agency's Previous Response
    Subject of Dispute Concerns Previous Allegation
      Second Request for Allegation Re Same Proposals
        Outside Time Limits

DIGEST NOTES

The Authority held that the substance of the dispute between the parties concerns the agency's previous allegation that the four proposals were nonnegotiable. The union's second appeal from that allegation was outside the time limits set forth in § 2424.3 of the Authority's regulations. Under § 7117(c)(2) of the Statute and § 2424.3 of the Authority's Rules and Regulations, the time limit for filing a petition for review of negotiability issues is 15 days after service on the union of the agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained. The union's first petition for review was dismissed as untimely filed because it failed to comply with the provisions of the Statute and the Authority's rules and regulations, applicable to the computation of time limits. Subsequently, the union again requested a written declaration of nonnegotiability from the Agency with respect to the same four proposals which had been subject to the dismissal referenced above. The agency informed the union that the request was the same as that to which it had previously responded and that it would not provide the union with a new allegation. The union then filed this negotiability appeal seeking review of the four proposals. The Authority has held that a union may file a petition for review of negotiability issues without a prior written agency allegation where the union has requested such an allegation and the agency has failed to provide it. The requirement that a petition for review must be filed within 15 days from the date of service on the union of an agency allegation does not apply in such circumstances. The fact that the union filed its petition approximately 75 days after it had requested a written allegation from the agency, would not, therefore render its petition untimely and would not, in and of itself, provide a basis for dismissing the union's appeal. The Authority found that the record demonstrated that the union's petition sought review of the agency's earlier allegation, which was previously provided to the union. Where a petition for review is filed concerning an agency's allegation of nonnegotiability which is only a restatement of a prior allegation, and no changes in the substance or language of the proposal have been effectuated during the period between the allegations, the petition seeks review of the earlier allegation. Therefore, the union's second appeal of the agency's allegation was also untimely.

23 FLRA No. 71

Federal Labor Relations Authority

VA Central Office, Washington, D.C. and VA Medical Center, Cincinnati, Ohio and AFGE, Local 2031, Case Nos. 5-CA-40056 and 5-CA-40059 (Decided September 30, 1986)

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practice
  Agency Violations
    Refusal to Comply
      With § 7131(a)
  Official Time
    Negotiation of Local Supplementary Agreements
      Employee-Negotiator Need Not Be Stationed At Local Facility
      Negotiation of Local Agreements Encompassed by § 7131(a)

STATUTE

7116(a)(1), (5) and (8)
7118
7131(a) and (d)

DIGEST NOTES

The Authority held, contrary to the Judge, that the agency violated § 7116(a)(1) and (8) when it refused to provide official time to unit employees to represent the union in local supplemental negotiations which was their right pursuant to § 7131(a). The issue was whether a unit employee who is not stationed at the site of the local supplemental negotiations is entitled to official time to represent the union. The Authority concluded that where parties at the level of exclusive recognition have authorized local supplemental negotiations, § 7131(a) entitles any employee in the unit to official time to represent the union at the local negotiations, unless the parties have agreed otherwise. The language of § 7131(a) requires that "any employee representing an exclusive representative in the negotiation of a collective bargaining agreement shall be authorized official time" so long as such employee is in the bargaining unit involved. The official time provisions of § 7131(a) encompasses the negotiation of local supplemental agreements, when authorized by the parties at the level of exclusive recognition. Any unit employee representing the union at local supplemental negotiations is entitled to official time regardless of whether the employee is stationed at the location which is the subject of local negotiations.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

PORTSMOUTH NAVAL SHIPYARD AND
DEPARTMENT OF THE NAVY
(WASHINGTON, D.C.)

Respondents

and   Case No. 1-CA-30290

INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL
ENGINEERS, LOCAL 4, AFL-CIO-CLC

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Administrative Law Judge's Decision filed by the General Counsel. The complaint alleged that the refusal by the Respondents Portsmouth Naval Shipyard and Department of the Navy (Washington, D.C.), hereafter also referred to separately as Respondent Shipyard and Respondent Navy, to permit a bargaining unit employee access to its agency grievance procedure because the employee was covered by a collective bargaining agreement and represented by a Union constituted a violation of section 7116(a)(1) and (2) of the Statute. The complaint further alleged that Respondent Shipyard committed a separate independent violation of section 7116(a)(1) of the Statute when its agent informed a unit employee that he could not utilize the Agency grievance procedure since he belonged to a unit covered by a collective bargaining agreement.

II. Facts

An employee of the Respondents in a unit represented by the Charging Party applied for a job outside that unit. When the applicant received a notice that he was ineligible for the position, he sought to grieve this rating through the parties' negotiated grievance procedure. The grievance was rejected by Respondent Shipyard on the ground that the negotiated grievance procedure permitted appeal of a rating only for a position within his own bargaining unit. Therefore, he was informed that he could not grieve a rating in conjunction with an application for a position outside his unit under the negotiated procedure. The employee next filed a grievance under the Agency grievance procedure.[1] Respondent Shipyard denied this grievance solely on the ground that Respondent Navy's Civilian Personnel Instruction (CPI) denied access to the Agency grievance procedure to a bargaining unit employee covered by a negotiated agreement. Respondent Shipyard informed the employee that, because of his "status," there was no formal procedure available to him for appealing or grieving his rating.

III. Administrative Law Judge's Decision

The Judge concluded that the complaint should be dismissed since the parties' negotiated grievance procedure arguably could have covered the employee's grievance, and the issue sought to be raised by the General Counsel was essentially one of contract interpretation unsuitable for resolution as an unfair labor practice.

The Judge further found that nothing in the Statute requires matters excluded from a negotiated grievance procedure to be subject to the agency grievance procedure, and the Office of Personnel Management's (OPM) regulations governing agency grievance procedures[2] grant an agency discretion in deciding whether or not it will extend coverage of its administrative grievance procedure to bargaining unit employees. The Judge found that Congress envisioned a dual procedure in section 7121 of the Statute, a negotiated grievance procedure for unit employees and an agency grievance procedure for nonunit employees. The Judge concluded, therefore, that even if the parties' contract did not cover the grievance, the Respondents' refusal to accept the unit employee's administrative grievance based solely on the employee's status as a member of a bargaining unit which had a collective bargaining agreement was consistent with the statutory scheme and was not violative of the Statute.

---

[1] Respondents conceded during the hearing that the employee's grievance fell within the scope of the Agency grievance procedure. Transcript at 18, lines 4-16.

[2] 5 C.F.R. § 771.204(b) provides, in pertinent part:

. . . . .

> (b) Discretionary coverage. An agency may extend the coverage of this part to bargaining unit employees consistent with the provisions of 5 U.S.C. 7121, or to applicants for employment with the agency.

IV. Positions of the Parties

The General Counsel contends in his exceptions that the Judge erred in concluding that the case involved differing and arguable interpretations of the collective bargaining agreement, since the parties stipulated that the employee's grievance was not covered by the parties' negotiated grievance procedure. The General Counsel also argues that as the Agency grievance procedure is a mechanism for resolving employee disputes which arise in the workplace, to the extent such disputes are not within the coverage of the negotiated grievance procedure, access to an agency procedure is a working condition of unit employees. The General Counsel maintains, therefore, that the Respondents' policy of denying access to its administrative grievance procedure solely on the basis of the employee's status as a member of a bargaining unit, without consideration of the scope of the negotiated grievance procedure, violates section 7116(a)(1) and (2) of the Statute.

The Respondents filed a Memorandum in Opposition to the General Counsel's exceptions which supported the Judge's Decision.[3]

V. Analysis

A. Threshold Questions

The Respondents asserted, both at the hearing and in their brief to the Judge, that the complaint was barred by the provisions of section 7116(d) of the Statute, and that it also was time-barred by section 7118(a)(4) of the Statute. The Judge did not address these issues in his Decision, and Respondents did not thereafter file an exception with regard to the Judge's failure to do so. As these matters were properly presented to the Judge by motion and argument, and raise questions regarding the Authority's jurisdiction, they will be addressed.[4]

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[3] The General Counsel moved to strike from Respondents' brief any portion which contested either the findings of fact by the Judge or the parties' stipulations of fact. Thereafter, the Respondents filed an opposition to the General Counsel's Motion to Strike. Since the Authority will consider only those facts properly before it and will not permit a party to unilaterally withdraw from a stipulation, it is unnecessary to pass on the General Counsel's Motion to Strike.

1. Section 7116(d) of the Statute[5]

The Union filed an institutional grievance on July 15, 1982. That grievance sought to contest the Agency's interpretation of the negotiated grievance procedure and its administrative grievance procedure which resulted in the creation of a "no man's land" with respect to a unit employee's ability to grieve merit promotion actions in connection with applications for positions outside the bargaining unit. The Union's grievance did not raise the issue sought to be addressed by this case, specifically, whether Respondents' conduct constituted interference and discrimination with regard to employee terms and conditions of employment in derogation of section 7102 and section 7116(a)(1) and (2) of the Statute. The complaint in this case is not barred by the provisions of section 7116(d) of the Statute since the issues raised by the complaint differ from those raised by the earlier grievance.[6]

---

[4] The Judge did not reach Respondents' jurisdictional arguments but recommended dismissal of the case on substantive grounds. The Judge should have addressed the jurisdictional issues raised before him. By so doing, the Judge would have provided a better record for Authority review and would avoid a possibility that the Authority would be required to remand the case for additional findings.

[5] Section 7116(d) of the Statute provides, in pertinent part:

§ 7116. Unfair labor practices

. . . .

> (d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. . . . [I]ssues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

2. Section 7118(a)(4) of the Statute[7]

We conclude that the complaint is not time-barred by the operation of section 7118(a)(4)(A) of the Statute. The maintenance and continued enforcement of a rule barring unit employees from access to the agency's grievance procedure, not merely the application of that rule to the grievant, is the violation charged in the complaint. The violation alleged is a continuing one and not time-barred by the provisions of section 7118(a)(4)(A) of the Statute since Respondents continued to maintain the rule within the six months preceding the filing of the unfair labor practice charge.[8]

B. The Unfair Labor Practice Allegations

1. Contract Interpretation

The Judge erred in recommending the dismissal of the complaint based on his conclusion that the negotiated grievance procedure arguably could have covered the employee's grievance. The parties stipulated otherwise, stating that the employee's grievance was not covered by the parties' negotiated grievance procedure. We do not find that there is any issue regarding grievability/arbitrability in this case where there is no dispute between the parties.

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[6] See Department of Defense, Defense Mapping Agency Aerospace Center, St. Louis, Missouri, 17 FLRA 71 (1985).

[7] Section 7118(a)(4) of the Statute provides, in pertinent part:

> § 7118. Prevention of unfair labor practices
>
> . . . .
>
> (a)(4)(A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority[.]

[8] See generally, Department of Defense, Department of the Air Force, 31st Combat Support Group, Homestead Air Force Base, 13 FLRA 239, 246, note 8 (1983).

2. Access to the Administrative Grievance Procedure

The Authority concludes that it is a violation of section 7116(a)(1) and (2) of the Statute to deny employees access to an administrative grievance procedure because they are represented by a union in an appropriate unit and covered by a collective bargaining agreement. The agency's administrative grievance procedure is a condition of employment as it is a personnel matter or practice established by rule or regulation for resolving disputes affecting employee working conditions.[9] Section 7116(a)(1) and (2) of the Statute clearly prohibits discrimination between unit and nonunit employees with respect to conditions of employment based solely on bargaining unit status. There is no indication in the Statute or its legislative history that Congress intended for there to be any exceptions to this prohibition other than those which derive from the Statute itself. While section 7121(a)(1) of the Statute provides, with certain exceptions, that the grievance procedures of a collective bargaining agreement are to be the exclusive procedures for resolving grievances which fall within its coverage, it does not prohibit employees from using the agency grievance procedure to raise issues outside the scope of the negotiated grievance procedure. Thus, while the Statute does not mandate the scope of an administrative grievance procedure, once such a grievance procedure is established, unit employees may not be denied access to it solely on the basis of their status as members of a unit covered by a collective bargaining agreement. We thus find that Respondents' policy of discriminating between represented and unrepresented employees regarding access to the Agency grievance procedure is prohibited by the Statute.

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[9] Section 7103 of the Statute defines conditions of employment as follows:

> § 7103. Definitions; application
>
> (a) For the purpose of this chapter--
>
> . . . . .
>
> (14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters--
>
> (Continued)

The Authority rejects the Respondent's contention that 5 C.F.R. § 771.204 issued by OPM permits the Agency to discriminate among its employees. OPM's regulations permit agencies to extend the coverage of the agency grievance procedure to bargaining unit employees to the extent consistent with the provisions of section 7121 of the Statute. That is, to the extent such matters do not fall within the coverage of the negotiated grievance procedure, they may be contested through administrative procedures. Nothing in the regulation permits Respondents to deny access to unit employees for matters which are not covered by the negotiated procedure.

The complaint also alleged, and the Authority finds, that Respondent Shipyard independently violated section 7116(a)(1) of the Statute when it informed an employee that since he was represented by the Union and covered by a collective bargaining agreement, he could not utilize the Agency's administrative grievance procedure. The standard by which to determine interference, restraint or coercion within the meaning of section 7116(a)(1) of the Statute is whether, under the circumstances, the employer's conduct may reasonably tend to coerce or intimidate the employee, or, in the case of a statement, whether the employee could reasonably have drawn a coercive inference from the statement. See Department of the Treasury, United States Customs Service, Region IV, Miami, Florida, 19 FLRA No. 114

(Continued)

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute[.]

(1985). See also Federal Mediation and Conciliation Service, 9 FLRA 199, 208 (1982); Department of the Treasury, Internal Revenue Service, Louisville District, 11 FLRA 290, 297 (1983). The Respondent Shipyard's statements would reasonably be expected to cause a unit employee to conclude that he was being denied access to the agency grievance procedure, a privilege available to nonunit employees, solely because his exclusive representative successfully negotiated a collective bargaining agreement. We find that the statement would discourage the exercise of an employee's protected right to engage in collective bargaining in violation of section 7116(a)(1) of the Statute.

C. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings made by the Judge at the hearing, finds that no prejudicial error was committed, and affirms those rulings. The Authority has considered the Judge's Decision and the entire record, including the parties' contentions, and adopts the Judge's findings and conclusions only to the extent consistent with this decision.

The Authority concludes that both Respondents violated section 7116(a)(2) of the Statute by discouraging membership in a labor organization by discrimination in connection with conditions of employment. This statutory violation is based on Respondents' maintenance of a rule or regulation which excludes employees who are members of a bargaining unit and covered by a collective bargaining agreement from utilizing the Respondents' administrative grievance procedure regarding matters not covered by the grievance/arbitration procedure in their existing collective bargaining agreement. The Authority further finds that, by such acts, the Respondents committed independent violations of section 7116(a)(1) of the Statute. The Authority also concludes that Respondent Portsmouth Naval Shipyard separately violated section 7116(a)(1) of the Statute by interfering with, restraining, or coercing employees in the exercise of rights guaranteed in section 7102 of the Statute when it informed a unit employee that, because he was covered by a collective bargaining agreement, he could not utilize the Respondents' grievance procedure to grieve the merit rating he had received when he applied for a position outside his bargaining unit.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that:

A. Respondents Portsmouth Naval Shipyard and Department of the Navy (Washington, D.C.) shall:

1. Cease and desist from:

(a) Discouraging membership in and activity on behalf of the International Federation of Professional and Technical Engineers, Local 4, AFL-CIO-CLC, the exclusive representative of a unit of the Shipyard's employees, or any other labor organization, by maintaining a rule which prohibits their bargaining unit employees from utilizing the agency grievance procedure to grieve matters not covered by their negotiated grievance procedure solely on the basis of the employee's inclusion within a bargaining unit covered by a collective bargaining agreement.

(b) Interfering with, restraining, or coercing employees in the exercise of their right to engage in collective bargaining assured by the Federal Service Labor-Management Relations Statute by enforcing a rule or regulation which prohibits their bargaining unit employees from utilizing the agency grievance procedure to grieve matters not covered by their negotiated grievance procedure solely on the basis of their status as employees within a bargaining unit covered by a collective bargaining agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of any right under the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Reinstate and process on the merits under the Agency's grievance procedure the grievance filed by Richard C. Russell, a unit employee, concerning his Merit Promotion rating for the position of Education Specialist.

(b) Post at Respondents' facility at Portsmouth Naval Shipyard copies of the attached Notice marked Appendix A on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander of the Portsmouth Naval Shipyard, Portsmouth, New Hampshire, or a designee, and shall be posted in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted, and maintained for 60 consecutive days thereafter. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director, Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

B. Respondent Portsmouth Naval Shipyard shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing employees in the exercise of their right to engage in collective bargaining assured by the Federal Service Labor-Management Relations Statute by making statements to unit employees to the effect that solely because they are covered by a collective bargaining agreement, they cannot utilize the Agency's administrative grievance procedure to grieve a matter not covered by their negotiated grievance procedure.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of any right under the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facility copies of the attached Notice marked Appendix B on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander of the Portsmouth Naval Shipyard, Portsmouth, New Hampshire, or a designee, and shall be posted in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted, and maintained for 60 consecutive days thereafter. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director, Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., September 29, 1986.

Jerry D. Calhoun

Jerry D. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX A

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discourage membership in and activity on behalf of the International Federation of Professional and Technical Engineers, Local 4, AFL-CIO-CLC, the exclusive representative of a unit of our employees, or any other labor organization, by maintaining and enforcing a rule which prohibits our bargaining unit employees from utilizing the agency grievance procedure to grieve matters not covered by their negotiated grievance procedure solely on the basis of the employee's inclusion within a bargaining unit which is covered by a collective bargaining agreement.

WE WILL NOT interfere with, restrain, or coerce our employees from the exercise of their right to engage in collective bargaining assured by the Federal Service Labor-Management Relations Statute by enforcing a rule or regulation which prohibits our bargaining unit employees from utilizing the agency grievance procedure to grieve matters not covered by their negotiated grievance procedure solely on the basis of their status as employees within a bargaining unit covered by a collective bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of any right under the Federal Service Labor-Management Relations Statute.

WE WILL reinstate and process on the merits the Agency grievance filed by Richard C. Russell, a unit employee, concerning his Merit Promotion rating for the position of Education Specialist.

____
(Activity)

Date: ____________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region I, Federal Labor Relations Authority, whose address is: 10 Causeway Street, Room 1017, Boston, Massachusetts 02222-1046, and whose telephone number is: (617) 565-7280.

APPENDIX B

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain, or coerce employees from the exercise of their right to engage in collective bargaining assured by the Federal Service Labor-Management Relations Statute by making statements to our unit employees to the effect that solely because they are covered by a collective bargaining agreement, they cannot utilize the agency's administrative grievance procedure to grieve a matter not covered by their negotiated grievance procedure.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of any right under the Federal Service Labor-Management Relations Statute.

____
(Activity)

Date: ________________ By: ____________________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region I, Federal Labor Relations Authority, whose address is: 10 Causeway Street, Room 1017, Boston, Massachusetts 02222-1046, and whose telephone number is: (617) 565-7280.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

PORTSMOUTH NAVAL SHIPYARD AND
DEPARTMENT OF THE NAVY
(WASHINGTON, D.C.)

Respondent

and

Case No. 1-CA-30290

INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL
ENGINEERS, LOCAL 4, AFL-CIO-CLC

Charging Party

. . . .

Steven Sharfstein, Esquire
For the Respondent

Peter E. Dow, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. 7101, et seq.[1], and the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1 et seq., concerns, in essence, whether it is an unfair labor practice to deny a bargaining unit employee access to Respondent's administrative grievance procedure because the employee is represented by a union in an appropriate unit and is covered by a collective bargaining agreement which, of course, contains a negotiated grievance and arbitration procedure. This case was initiated by a charge filed on August 17, 1983 (G.C. Exh. 1A), which named only the Portsmouth Naval Shipyard and alleged violations of § 16(a)(1), (5), (7) and (8) of the Statute; and a First Amended Charge filed on February 6, 1984 (G.C. Exh. 1C), which named for the first time the United States Navy as a party, as well as the Portsmouth Naval Shipyard, and alleged violations of § 16(a)(1) and (2) of the Statute. The Complaint and Notice of Hearing issued on February 13, 1984 (G.C. Exh. 1E), and fixed the date of hearing for April 6, 1984; and, pursuant thereto, a hearing was duly held on April 6, 1984, in Portsmouth, New Hampshire, before the undersigned.

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, e.g., Section 7116(a)(1) will be referred to, simply, as "§ 16(a)(1)."

All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved and presented oral argument. At the close of the hearing, May 31, 1984, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, upon timely motion of Respondent, for good cause shown, as to which General Counsel did not object, to June 22, 1984. Respondent and General Counsel each timely mailed an excellent brief, received on or before June 25, 1984, which have been carefully considered. Upon the basis of the entire record,2/ I make the following findings and conclusions:

2/ General Counsel filed a Motion to Correct Transcript, to which no opposition was filed, and said motion is hereby granted except as follows: (a) the correction requested on p. 32, l. 5 is denied; (b) the correction requested on p. 61, l. 22-23 is denied; and (c) the correction requested on p. 63, l. 14-15 is denied. In each of these instances, the transcript appears correct and complete. On my own motion, the following, additional corrections to the transcript are hereby made:

PAGE	LINE	FROM	TO
64	20	"allegation"	"allegations"
	21	"violation"	"violations"
	21-22	"shipyard merit promotion program exclusive of this agreement"	"the Shipyard Merit Promotion Program exclusive of this AGREEMENT"
	22		"insert comma after the words "appeals" and "appropriate"
	24	"in"	"and"

The transcript is hereby corrected as fully set forth in the Appendix hereto.

Findings

There is no dispute as to the facts which were presented wholly by exhibits and by stipulation.

1. On April 29, 1983, Mr. Richard C. Russell, an engineering technician employed by the Portsmouth Naval Shipyard in the bargaining unit represented by the International Federation of Professional and Technical Engineers, Local 4, AFL-CIO-CLC (hereinafter referred to as "Local 4"), received a "Notice of Rating on Competitive Promotion Examination" (dated April 28, 1983) for the position of Education Specialist as follows:

> "Ineligible . . .
>
> "Your application does not show that you meet the minimum experience requirements." (Jt. Exh. F).

The position for which Mr. Russell had applied, Education Specialist, (Announcement No. 83-31-18), was outside the bargaining unit represented by Local 4 and was in a separate and distinct bargaining unit represented by another union.[3]

2. On May 9, 1983, Mr. Russell filed a grievance, (Jt. Exh. G), pursuant to Article 7, Section 11 of the parties' current agreement (Jt. Exh. E). In response to the printed statement, "The following states the specific reason(s) why I feel my rating is incorrect," Mr. Russell stated:

> "My education, training, and related experience were not correctly evaluated." (Jt. Exh. G).

Under, "The following relief is desired," Mr. Russell stated:

> 1. Reevaluate my application, giving proper consideration to my education, training, and related experience.
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> 2. If my rating is less than "HIGHLY QUALIFIED," furnish specific reasons, in writing, identifying the area(s) where I fail to qualify." (Jt. Exh. G).

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[3] Actually, there are three other bargaining units at the Portsmouth Naval Shipyard represented by: Local 2024, American Federation of Government Employees; Federal Employees Metal Trades Council; and Local F-123 International Association of Fire Fighters (Jt. Exh. Q).

3. On May 13, 1983, Mr. Russell's grievance, under the negotiated grievance procedure, was rejected by the Shipyard for the reasons that,

> "1. . . . the position you applied for is not subject to the provisions of reference (a) [Agreement between the International Federation of Professional and Technical Engineers and the Portsmouth Naval Shipyard - Jt. Exh. E]. Therefore, enclosure (1) [earned rating grievance] is rejected and returned without action." (Jt. Exh. H).

4. On May 20, 1983, Mr. Russell, in view of the Shipyard's rejection of his grievance under the negotiated grievance procedure, filed a grievance (Jt. Exh. I) under the Shipyard's administrative grievance procedure (NAVSHIPYD PTSMH INST 12770.1H [Jt. Exh. D]). On May 25, 1983, the Shipyard rejected this grievance for the reason:

> ". . . that paragraph 7, of reference (a) [NAVSHIPYD PTSMH INST 12770.1H[4]] specifically states that employees having access to negotiated grievance procedures are not covered by this instruction.[5] Your grievance is, therefore, rejected and returned without no further action." (Jt. Exh. J).

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[4] This response referenced the Instruction as "dtd 26 Mar 1983." The reference to "1983" was, obviously, a typographical error as the Instruction is dated 26 March 1981 and it was stipulated that paragraph 7, entitled "Employee Coverage" had not been updated (Tr. 62-63).

[5] Paragraph 7 excludes from coverage, *inter alia*:

> "a. Employees having access to a negotiated grievance procedure, *which procedure includes matters covered by this instruction.*" (Jt. Exh. D) (Emphasis supplied).

General Counsel asserts that this provision ". . . is less restrictive than CPI 771 [Jt. Exh. C which, as amended April 14, 1982, excludes, *inter alia*, "(5) a bargaining unit employee covered by a negotiated contract." (Jt. Exh. C, Par. III (5)] as it would exclude from access those employees with resort to a negotiated grievance procedure which *included* matters covered by the Instruction." (G.C. Brief, p.4, n.1), *i.e.*, Mr. Russell's grievance, if it were not covered by the negotiated grievance procedure would, under the Shipyard Instruction prior to the Department of the Navy's issuance of the April 14, 1982, amendment of CPI 771 which specifically excluded from coverage *all* bargaining unit employees covered by a negotiated contract, have been covered by the Shipyard's administrative grievance procedure (Tr. 24).

(Footnote continued)

5. On May 31, 1983, Mr. Russell requested an extension of any time limits applicable either to an administrative grievance or to a grievance under the negotiated agreement pending advice from Mr. Joseph R. Evans, Head, Employee Relations Division (Jt. Exh. K) which was granted (Jt. Exh. M). Also on May 31, 1983, Mr. Russell requested Mr. Evans to advise him of the appropriate procedure by which he, "a member of the IFPTE bargaining unit, may submit an appeal or grievance, relating to a promotion action to a non-unit position . . . so that the appeal or grievance will be accepted and resolved." (Jt. Exh. L; Stip. Tr. 61-62). By letter dated June 9, 1983 (Jt. Exh. N), Mr. Evans responded that there ". . . is no formal procedure available to you for appealing or grieving this promotion action. . . ." (Jt. Exh. N; Stip. Tr. 62).

6. By letter dated June 17, 1983, Mr. Russell advised Mr. Kautz that he was referring this matter to the Federal Labor Relations Authority as, he asserted, that Mr. Evans' ". . . decision [that there is no formal procedure available to you for appealing or grieving this promotion action] violates federal law. . . ." (Jt. Exh. O). In addition, Mr. Russell requested a further extension of the applicable time limit pending final adjudication of this issue which was granted by letter dated June 22, 1983, (Jt. Exh. P) (". . . ten days following a decision by the FLRA to continue processing your grievance.") (Jt. Exh. P)).

7. Article 7 of the parties' current agreement ((Jt. Exh. E), is the negotiated grievance procedure. Section 1 provides, in part, as follows:

> "Section 1. This Article provides the exclusive procedure for the settlement of employee, Employer and Union grievances. A grievance means any complaint:
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> "a. By any employee concerning any matter relating to the employment of the employee;
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> . . . ."(Jt. Exh. E, Art. 7, Sec. 1a)
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> "Section 2. Only the following types of actions are specifically excluded from the provisions of Articles 7 and 9 [Arbitration] . . .
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> . . .

5/ (Footnote continued)

Obviously, Mr. James H. Kautz, Head, Employment Division, Industrial Relations Office, in rejecting Mr. Russell's grievance did not construe Paragraph 7 of the Shipyard's Instruction in the same manner as General Counsel. Since Mr. Kautz later cited and relied upon CPl 771, it is unnecessary to decide which interpretation of the Shipyard's Instruction is more plausable.

> "d. Any examination, certification, or appointment;
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> . . . ." (Jt. Exh. E, Art. 7, Sec. 2d)
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> "Section 11. Earned Rating Grievances.
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> . . .
>
> "d. Should the decision of Code 170 be unsatisfactory to the employee, the matter may be taken to arbitration if so elected by the Union." (Jt. Exh. E, Art. 7, Sec. 11d)

Nothing contained in Article 7 purports to exclude Mr. Russell's grievance; however, Article 23, entitled "MERIT PROMOTION AND PLACEMENT PROGRAM," which, in part, provides in Section 1 that, "The provisions of this Article apply only to the filling of unit positions by unit employees. . . ." (Emphasis supplied), in Section 17 provides as follows:

> "Section 17. An employee dissatisfied with an earned rating in connection with his/her application for promotion to a unit position may grieve in accordance with the provisions of Article 7, Section 11 of the Agreement." (Jt. Exh. E, Art. 23, Sec. 17) (Emphasis supplied).

Mr. Evans, in his letter dated June 9, 1983 (Jt. Exh. N), made it clear that he relied upon the provision of Article 23, Section 17 for his conclusion that, ". . . you are barred from utilizing the negotiated grievance procedure to resolve your displeasure with the promotion action of an American Federation of Government Employees (AFGE) unit position." (Jt. Exh. N). Mr. Evans further stated that, "Access to the Department of the Navy (Administrative) Grievance Procedure ". . . is disallowed by controlling Department of the Navy regulation, Civilian Personnel Instruction (CPI) 771 . . . Based upon this regulation, you, as a member of the IFPTE bargaining unit, are precluded from utilizing the Navy (Administrative) Grievance Procedure because (1) IFPTE has been accorded exclusive recognition, and (2) a negotiated contract is currently in effect." (Jt. Exh. N).

8. Although the parties stipulated that,

> ". . . the Union has concurred with the shipyard's position that the grievance procedure in the current collective bargaining agreement is as asserted by the shipyard not applicable" (Tr. 61),

such "stipulation" is not a stipulation of fact, which would be binding on the undersigned, but, rather, is a conclusion of law, which is not binding on the undersigned. Indeed, General Counsel stated at the hearing, ". . . I think . . . that an argument could be made . . . that this particular grievance may have been arbitrable under the contract" (Tr. 12) and, "I can make an eloquent argument, I'm sure, why it should be grievable under their contract. . . ." (Tr. 22); more important, Respondent's Brief states that, ". . . it is Respondent Department of the Navy's position that this matter could have been raised under the negotiated procedure. . . ." (Respondent's Brief, p. 26, n. 41) (Emphasis supplied).

Conclusions

It is not contended, nor may it be, that denial of access to an agency's administrative grievance procedure for a matter subject to a negotiated grievance procedure constitutes an unfair labor practice, for that is plainly what the Statute mandates (". . . the procedures [i.e., the negotiated procedures] shall be the exclusive procedures for resolving grievances which fall within its coverage" § 21(a)(1)) and what the agreement of the parties provides ("This Article provides the exclusive procedure for the settlement of . . . grievances" (Jt. Exh. E, Art. 7, Sec. 1)). All other considerations aside, the threshold, and controlling, issue is whether the grievance, from which this case arises, was subject to the parties negotiated grievance procedure. Questions of arbitrability are, pursuant to § 21(a)(1) of the Statute, and Article 9, Section 3 of the parties' agreement (Jt. Exh. E), to be determined by an arbitrator; but is is both necessary and proper to determine herein whether the record clearly shows[6] that Mr. Russell's grievance was not subject to the parties' negotiated grievance procedure. Respondent Shipyard determined that it was not and Local 4 concurred (Stip., Tr.61); but no arbitrator has so determined and, for reasons set forth hereinafter, I conclude that the record fails to show clearly that Mr. Russell's grievance was not subject to the negotiated grievance procedure.

First, the Shipyard appears to have given scant attention to the grievance itself. To the contrary, Mr. Evans, in his response of June 9, 1983 (Jt. Exh. N), characterized Mr. Russell's grievance as ". . . displeasure with the promotion action . . . .", whereas Mr. Russell's grievance, while it related, certainly, to a position outside the bargaining unit, did not reach "promotion action," i.e., selection or non-selection; but rather it was the rating itself which the grievance asserted was incorrect for the reasons that,

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[6] I am aware that the Authority, in Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 11 FLRA No. 80, 11 FLRA 456 (1983), held that ". . . all questions of arbitrability must be submitted to an Arbitrator" (11 FLRA at 457), notwithstanding that Chief Judge Fenton had found the ". . . request for arbitration is so clearly lacking in contract support as to be deemed frivolous." (11 FLRA at 474). But, Cf., Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri, 11 FLRA No. 90, 11 FLRA 516 (1983).

> "My education, training, and related experience were not correctly evaluated" (Jt. Exh. G)

and the relief, and only relief, requested was:

> "1. Reevaluate my application . . .
>
> "2. If my rating is less than "HIGHLY QUALIFIED", furnish specific reasons, in writing, identifying the area(s) where I fail to qualify." (Jt. Exh. G).

Had Mr. Russell's grievance been resolved on its merits and had be prevailed,[7] he would, simply, have been rated "Highly Qualified" on the Notice of Rating on Competitive Promotion Examination.

Second, Article 7, together with Article 9 (Arbitration), sets forth a wholly complete grievance procedure. While Section 2d of Article 7 excludes, "Any examination, certification, or appointment" it has not been asserted by Respondent Shipyard that the "Notice of Rating on Competitive Promotion Examination" issued to Mr. Russell falls whtin this exemption. Quite to to the contrary, the Shipyard treated this as "an earned rating," albeit under Article 23, Section 17; and if it were "an earned rating" under Article 23, Section 17, it seems inescapable that it was equally "an earned rating" under Section 11 of Article 7. Article 7, Section 11, provides, in part, that:

> "a. If an employee is dissatisfied with an earned rating, such dissatisfaction must be made verbally known . . . ." (Jt. Exh. E, Art. 7, Sec. 11a).

and if the dissatisfaction is not resolved to the satisfaction of the employee, ". . . the matter may be taken to arbitration if so elected by the Union" (Jt. Exh. E, Art. 7, Sec. 11d). Mr. Russell, a member of Local 4's bargaining unit, as a member of the bargaining unit received a rating with which he was dissatisfied. The fact that the job, for which the rating was sought and given, was outside the bargaining unit does not alter the fact that a bargaining unit member received a rating which he asserted was not correct and which he sought to have corrected pursuant to Article 7, Section 11 of the parties agreement. Cf. Veterans Administration Hospital, Lexington, Kentucky, 2 FLRA No. 110, 2 FLRA 878 (1980).

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[7] Article 9, Section 2 of the parties agreement provides in part, that: "The parties agree that the issue(s) to be arbitrated shall be no broader in scope than the issue(s) presented during the grievance procedure. . . ." (Jt. Exh. E, Art. 9, Sec. 2).

Third, Article 23 is entitled "MERIT PROMOTION AND PLACEMENT PROGRAM" and in Section 1 provided, in part, that

> "The provision of this Article apply only to the filling of unit positions by unit employees . . . ." (Jt. Exh. E, Art. 23, Sec. 1) (Emphasis supplied).

Section 17 of Article 23, provides that:

> "An employee dissatisfied with an earned rating in connection with his/her application for promotion to a unit position may grieve in accordance with the provisions of Article 7, Section 11 of the AGREEMENT." (Jt. Exh. E, Art. 23, Sec. 17) (Emphasis supplied).

By its language, Section 17, supra, does not purport to qualify, limit, or modify Article 7, Section 11; but, rather, provides that an earned rating for promotion to a unit position may be grieved pursuant to Article 7, Section 11.

What does Article 7, Section 11, itself, encompass? Is the coverage of Article 7, Section 11 modified or limited by Article 23, Section 17? Was Mr. Russell's grievance, to correct a rating, cognizable under Article 7? However stated, the question of arbitrability must be resolved by an Arbitrator. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 11 FLRA No. 80, 11 FLRA 456 (1983). The Shipyard may be entirely correct; but it may be wrong. Indeed, as noted above, Respondent Department of the Navy's position is ". . . that this matter could have been raised under the negotiated procedure." It would be improper for me to resolve the question of arbitrability, Department of the Navy, Portsmouth Naval Shipyard, supra, and I expressly decline to do so.

Does the Union's concurrence with the Shipyard's position that Mr. Russell's grievance was not subject to the negotiated grievance procedure effectively bypass, or negate, the determination of arbitrability as a necessary predicate for the unfair labor practice allegation? Section 3 of Article 9 of the parties' agreement provides, in part, that

> "Questions that cannot be resolved by the Employer and the Union as to whether or not a grievance is subject to arbitration under this AGREEMENT shall be referred to an arbitrator for decision . . . ." (Jt. Exh. E, Art. 9, Sec. 3).

It is true that the parties purport to have resolved that Mr. Russell's grievance is not subject to arbitration under their Agreement[8/]; but it is clear that Local 4 "concurred" with the Shipyard's position only for the purpose of this proceeding and, indeed, made no final resolution that the grievance was not subject to arbitration under the negotiated agreement but, to the contrary, preserved the right to proceed under the negotiated procedure. The parties made no agreement which would have excluded all such disputes from the negotiated procedure.[9/] Nor may the parties confer jurisdiction by agreement. National Treasury Employees Union, Chapter 208, 4 FLRA No. 31, 4 FLRA 215, 216 (1980) (there the Agency denied a grievance as non-grievable because it was specifically excluded by § 21(c)(2) of the Statute; subsequently, the Agency advised the Union that the matter was non-grievable because it was non-negotiable and, pursuant to the parties' agreement, the Union's recourse was to the Authority; the Union then filed a negotiability appeal to the Authority; and the petition was dismissed).

Where the unfair labor practice alleged is bottomed on differing and arguable interpretations of a collective bargaining agreement, here, specifically, as to whether Mr. Russell's grievance to correct an earned rating was subject to the negotiated grievance procedure, it has long been

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8/ Obviously, not every dispute as to grievability or arbitrability is resolved by arbitration. Unions must, consistent with their duty of fair representation, have discretion as to matters they take to arbitration. As between themselves, agreement of the parties that a particular matter is not arbitrable is also consistent with the Authority's Interpretation and Guidance, 2 FLRA 273, 279 n. 7 (1979) which states, in part, that,

> ". . . such procedures must be read as providing that all questions of arbitrability not otherwise resolved shall be submitted to arbitration." (Emphasis supplied).

9/ Not only was no such agreement made, but on, or about, September 3, 1983, the Union proposed, in coordination with other Unions at the Shipyard, that,

> ". . . any grievance concerning a Merit Promotion opportunity in a bargaining unit other than the grievant's shall be processed using the grievance and arbitration procedure applicable to the bargaining unit the grievant is a member of . . . ." (Jt. Exh. Q).

The Shipyard did not accept the proposal and it was not pursued further (Tr. 45).

recognized that the remedy lies within the grievance machinery of the negotiated agreement, rather than through the unfair labor practice procedures. General Services Administration, Region 5, Public Buildings Services, Chicago Field Office, A/SLMR No. 528, 5 A/SLMR 424 (1975); Federal Aviation Administration, Muskegon Air Traffic Control Tower, A/SLMR No. 534, 5 A/SLMR 457 (1975); Department of Army, Watervliet Arsenal, Watervliet, New York, A/SLMR No. 624, 6 A/SLMR 127 (1976); Aerospace Guidance and Metrology Center, Newark Air Force Station, Newark, Ohio, A/SLMR No. 677, 6 A/SLMR 361 (1976); Division of Military and Naval Affairs, State of New York, Albany, New York, 8 FLRA No. 71, 8 FLRA 307, 322 (1982); Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 11 FLRA No. 80, 11 FLRA 456 (1983); Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri, 11 FLRA No. 90, 11 FLRA 516 (1983); Department of Defense, Department of the Air Force, 31st Combat Support Group, Homestead Air Force Base, 13 FLRA No. 41, 13 FLRA 239 (1983). For this reason alone, I recommend that the Complaint herein be dismissed.

Should the Authority determine, contrary to my conclusion, that Local 4's concurrence with the Shipyard's position that Mr. Russell's grievance was not subject to the negotiated grievance procedure negates determination of arbitrability as a necessary predicate to the unfair labor practice allegation, or should an arbitrator determine that Mr. Russell's grievance is not subject to the negotiated grievance procedure, I nevertheless conclude that Respondent's denial of access to its administrative grievance procedure does not constitute an unfair labor practice in violation of § 16(a)(1) or (2) of the Statute.

§ 21 of the Statute provides, in part, as follows:

> "(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section [1(d) relates to prohibited personnel practices under §2302(b)(1); and (e) relates to matters covered under §§4303 and 7512], the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.
>
> "(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement." (5 U.S.C § 7121(a)(1) and (2)) (Emphasis supplied).

The Conference Report accompanying the final version of the bill which was subsequently enacted and signed into law stated with regard to § 21(a) as follows:

"A. EXCLUSIVITY OF GRIEVANCE PROCEDURE

"Senate section 7221(a) provides that, except for certain specified exceptions, an employee covered by a collective bargaining agreement must follow the negotiated grievance procedures rather than the agency procedures available to other employees not covered by an agreement. House section 7121(a) does not limit the employee to the negotiated procedures in the case of any type of grievance.

"The House recedes.

. . .

"C. SCOPE OF GRIEVANCE PROCEDURES

"The Senate provides that the coverage and scope of the grievance procedures shall be negotiated by the parties (section 7221(a)). House section 7121(a) does not authorize the parties to negotiate over the coverage and scope of the grievances that fall within the bill's provisions but prescribes those matters which would have to be submitted, as a matter of law, to the grievance procedures. The Conference report follows the House approach with an amendment. All matters that under the provisions of law could be submitted to the grievance procedure shall in fact be within the scope of any grievance procedure negotiated by the parties unless the parties agree as part of the collective bargaining process that certain matters shall not be covered by the grievance procedures." (Emphasis supplied). Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, 96th Cong. 1st Sess., Subcommittee on Postal Personnel and Modernization of the Committee on Post Office and Civil Service, H.R. Committee Print No. 96-7 at p. 825 (hereinafter, referred to as "Legislative History," followed by the page number of the bound legislative history). (Conference Report, H.R. Report No. 95-1717, 95th Cong., 2nd Sess.).[10/]

[10/] General Counsel's citation of a portion of S. Rep. No. 95-969 (General Counsel's Brief, p. 6 n. 5) is somewhat specious as the portion of the Report quoted and relied upon (Legislative History, p. 762) refers to a provision of S. 2640, § 7212(c) (Legislative History, p. 573), not enacted as it appeared in the Senate Bill. Compare, § 14 of the

(Footnote continued)

See also, American Federation of Government Employees, AFL-CIO, Local 2782, 6 FLRA No. 56, 6 FLRA 314, 322 (1981).

In National Federation of Federal Employees, Local 15, 9 FLRA No. 56, 9 FLRA 478 (1982), the Authority stated,

> ". . . While the Army's regulations may limit the scope of the Agency's grievance procedures, such regulations may not be applied in a manner inconsistent with the broad scope negotiated grievance procedures allowed under section 7121 of the Statute. Under section 7121 a negotiated grievance procedure extends to all matters which under the provisions of law could be covered unless the parties agree through collective bargaining to a procedure having a narrower coverage. . . ." (9 FLRA at 479).

The scope of administrative grievance procedures is subject to government-wide regulation emanating from the Office of Personnel Management. 5 C.F.R. § 771.204 provides as follows:

> "§ 771.204 Employee coverage.
>
> "(a) Required coverage. Except as provided in § 771.206(b), this part shall cover all non-bargaining unit employees of the agency.
>
> "(b) Discretionary coverage. An agency may extend the coverage of this part to bargaining unit employees consistent with the provisions of

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10/ (Footnote continued)

Statute and specifically subsections (a)(5) (5 U.S.C. § 7114(a)(5)) with Section 7121(c) of S. Bill 2640 and Section 7(d) or Executive Order 11491, as amended, on which 7212(c) was based, and is also somewhat misplaced in that, as pertains to the matter at issue, it ignores the legislative history of § 21 of the Statute, set forth above, which directly, controls both the exclusively and scope of negotiated grievance procedures. § 14(a)(5)(B) as enacted, 5 U.S.C. § 7114(a)(5)(B), not only does not create a separate right for employees to utilize agency grievance procedures, as General Counsel appears to concede, General Counsel's Brief, p. 7, n. 7, but § 14(a)(5)(B) simply provides that the rights of an exclusive representative shall not preclude an employee from exercising grievance or appellate rights established by law, rule, or regulation ". . . except in the case of grievance or appeal procedures negotiated under this chapter."

> 5 U.S.C. 7121, or to applicants for employment with the agency." (Jt. Exh. B. See, also, the wholly like provision of the Federal Personnel Manual, Chapter 771, Agency Administrative Grievance System, § 2-5 a and b (Jt. Exh. A)) (Emphasis supplied).[11]

Department of the Navy Regulation, CPl 771 (OPNAVNOTE 12771 (Jt. Exh. C) provides, in part as follows:

> "III. Employee Coverage.
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> "This regulation applies to all DON employees except for:
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> . . .
>
> "(5) A bargaining unit employee covered by a negotiated contract.
>
> . . . ." (Jt. Exh. C).

OPM's government-wide regulations require that agency grievance procedures cover all non-bargaining unit employees[12]; but OPM's Regulations do not require that an agency's administrative grievance procedure cover bargaining unit employees. To the contrary, 5 C.F.R. § 771.204(b) specifically provides that it is discretionary whether an agency extend coverage of its administrative grievance procedure to bargaining unit employees. Thus, the Regulation states,

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[11] The Federal Personnel Manual, by way of guidance, further states with respect to discretionary bargaining unit employee coverage:

> "(1) This means that the agency has the option to extend coverage for bargaining unit employees under the administrative procedures on those matters that are mutually excluded from negotiated grievance procedures. However, bargaining unit employees have the same rights as non-bargaining unit employee until the agency and the exclusive representative negotiate a grievance procedure pursuant to 5 U.S.C. § 7121 and the negotiated grievance procedure becomes operative." (Jt. Exh. A).

[12] And bargaining unit employees until such time as a collective bargaining agreement is negotiated, which must, pursuant to § 21(a)(1) of the Statute, provide a negotiated procedure which "Except as provided in subsection (d) and (e) . . . shall be the exclusive procedures for resolving grievances which fall within its coverage."

> "(b) Discretionary coverage. An agency may extend the coverage. . . to bargaining unit employees consistent with the provisions of 5 U.S.C. 7121 . . . ." (5 U.S.C. § 771.204(b)).

The Federal Personnel Manual sets forth precisely the same coverage and by way of guidance states that,

> "(1) This means that the agency has the option to extend coverage for bargaining unit employees under the administrative procedure on those matters that are mutually excluded from negotiated grievance procedures . . . ."

The government-wide regulation is controlling and is lawful; and it grants absolute discretion to each agency to extend, or not to extend, coverage of its administrative grievance procedure to bargaining unit employees covered by a collective bargaining agreement. The Department of the Navy's exercise of the discretion granted, to exclude bargaining unit employees covered by a negotiated contract, was neither discriminatory, in violation of § 16(a)(2) of the Statute, nor did it interfere with, restrain, or coerce any employee in the exercise by the employee of any right assured by § 2, in violation of § 16(a)(1) of the Statute.

Congress intended that,

> ". . . All matters that under the provisions of law could be submitted to the grievance procedure shall in fact be within the scope of any grievance procedure negotiated by the parties . . . ." (Legislative history, p. 825).

Unless, as it provided in § 21(a)(2), ". . . the parties agree as part of the collective bargaining process that certain matters shall not be covered by the grievance procedures" (Legislative history, p. 825). Nevertheless, it was the intent of Congress, as it provided in § 21(a), that,

> ". . . an employee covered by a collective bargaining agreement must follow the negotiate grievance procedures rather than the agency procedures available to other employees not covered by an agreement . . . ." (Legislative history, p. 825).

Where unions have sought to limit exclusivity by broadening the option to select a statutory appeals procedure the Authority has held such proposals not within the duty to bargain. Thus, in American Federation of Government Employees, AFL-CIO, Local 2955, 5 FLRA No. 86, 5 FLRA 617 (1981), the Authority held,

> ". . . we find, in agreement with the Agency, that the disputed provision purports to grant to bargaining unit employees the option to choose either the negotiated grievance procedure or a statutory procedure with respect to 'any matter' covered by the grievance procedure. This is clearly inconsistent with section 7121(a)(1) of the Statute which permits such option only in very limited circumstances: that is, where the grievance falls within the coverage of either section 7121(d) or (e) of the Statute. In all other situations, notwithstanding the possible existence of an otherwise applicable statutory procedure, the negotiated procedure must be the exclusive procedure for resolving grievances which fall within its coverage." (5 FLRA at 620).

To like effect, see, also: American Federation of Government Employees, AFL-CIO, Local 2904, 7 FLRA No. 28, 7 FLRA 188 (1981).

As "All matters that under the provisions of law could be submitted to the grievance procedure shall in fact be within the scope of any grievance procedure negotiated by the parties" (Legislative history, p. 825) and as "the negotiated procedure must be the exclusive procedure for resolving grievances which fall within its coverage" (AFGE, Local 2955, supra), it may well be that there is not even a duty to bargain as to extension of agency grievance procedures to matters excluded from the negotiated procedures pursuant to § 21(a)(2) of the Statute; but whether there is, or is not, a duty to bargain is not an issue before me and I express no opinion in that regard. Clearly, pursuant to OPM's government-wide Regulation, Respondent Department of the Navy in its discretion could have elected to extend its administrative grievance procedure to matters other than those provided in § 21(d) or (e) of the Statute, but it chose not to do so. Respondent did not violate either § 16(a)(1) or (2) of the Statute by excluding "A bargaining unit employee, covered by a negotiated contract" (Jt. Exh. C) as Congress plainly stated that, ". . . an employee covered by a collective bargaining agreement must follow the negotiated grievance procedures rather than the agency procedures available to other employees not covered by an agreement . . . ." (Legislative history, p. 825).

Congress envisioned a dual procedure. A negotiated grievance procedure for employees represented and covered by collective bargaining agreements; and an agency grievance procedure for employees not covered by a collective bargaining agreement. If, pursuant to § 21(a)(2), any matter is excluded from application of the negotiated grievance procedure by agreement, presumptively the parties intend that such matter be excluded as a grievable or arbitrable matter. cf., Textile Worker's Union of America v. Lincoln Mills, 353 U.S. 448 (1957); United Steelworkers of

America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).[13] Congressman Ford in his post-enactment remarks, stated, in part, as follows:

> "The labor organization is required to meet a duty of fair representation for all employees . . . The costs involved in the procedure, which may well involve arbitration, are high. Although the basic House approach of stating in the statute the scope of the procedure was followed, the conferees also adopted a provision aimed solely at allowing the exclusive representative, at its option, to propose and agree to a reduced coverage for the negotiated grievance procedure - perhaps for financial reasons . . . ." (Legislative history, pp. 997-998).

Nothing in the Statute requires that any matter excluded from a negotiated grievance procedure pursuant to § 21(a)(2) must be subject to an agency's administrative grievance procedure; OPM's government-wide regulation grants each agency absolute discretion as to whether its administrative grievance procedure will be extended to bargaining unit employees covered by a collective bargaining agreement; and Respondent's lawful exercise of the discretion accorded, by 5 C.F.R. § 771.204(b), to exclude bargaining unit employees covered by a negotiated contract did not violate § 16(a)(1) or (2) of the Statute.

In point of fact, this case does not involve a matter that would, in any event, have been subject to the administrative grievance procedure because it involved a procedure available to employees not covered by an agreement; but, quite to the contrary, relates to a job opportunity in a bargaining unit other than the Local 4's covered by a collective bargaining agreement. Local 4 very correctly perceived the desirability, if not the necessity, of seeking a solution through coordinated negotiations with the other unions and the Shipyard.

In view of my conclusions, it is unnecessary to reach other issues raised, including the assertions that the charge was not timely filed against Respondent (Respondent's Brief, p. 12) or that the instant matter is barred by § 16(d) of the Statute (Respondent's Brief, p. 15), and I express no opinion whatever with respect thereto.

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[13] Mr. Justice Brennan stated, for example:

> "And I emphasize this, for the arbitration promise is itself a contract. The parties are free to make that promise as broad or as narrow as they wish for there is no compulsion in law requiring them to include any such promise in their agreement." (363 U.S. at 570).

Having found that Respondents did not violate either § 16(a)(1) or 16(a)(2) of the Statute by denying a bargaining unit employee covered by a collective bargaining agreement access to its administrative grievance procedure, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. 1-CA-30290 be, and the same is hereby, dismissed.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: February 25, 1985
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1631
Union

and

Case No. 0-AR-1172

VETERANS ADMINISTRATION
MEDICAL CENTER, CHILLICOTHE, OHIO
Activity

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Louis V. Immundo, Jr. filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

A grievance was filed and submitted to arbitration where the Arbitrator framed the issue as whether management violated the parties' collective bargaining agreement by not temporarily promoting the grievant, a clerk-stenographer, GS-3, to the position of secretary-stenographer, GS-5. The Arbitrator found that the grievant performed some of the duties of the GS-5 position for a 10-month period and that she apparently performed those duties in a satisfactory manner. The Arbitrator concluded that by not detailing the grievant to the higher-graded position, management violated the spirit of Article 10 of the parties' collective bargaining agreement relating to equitable, nondiscriminatory treatment of employees. However, the Arbitrator further found, based on a determination by the Office of Personnel Management, that the grievant was not eligible for promotion to GS-5 under X-118 civil service qualification standards. The Arbitrator therefore concluded that management did not violate Article 16 of the parties' agreement by not temporarily promoting the grievant to the GS-5 position. Finding that no remedy could be applied for a violation of the spirit of Article 10, the Arbitrator, as his award, denied the grievance.

III. EXCEPTION

In its exception the Union contends that the award is contrary to law and regulation. Essentially, the Union argues that the award is deficient because the Arbitrator failed to award the grievant a retroactive temporary promotion and backpay for the period of time he found that she was assigned duties of the GS-5 position.

IV. ANALYSIS AND CONCLUSIONS

We conclude that the exception fails to establish that the award is contrary to law or regulation. To the contrary, the award is strictly in accordance with civil service law and regulation. The Authority has recognized that in order for an employee to be properly promoted consistent with civil service law and regulation, whether temporarily or permanently, the employee must meet at the time of the promotion the minimum qualification requirements for the position to which the employee is to be promoted. *For example*, *Veterans Administration, VA Medical Center, Muskogee, Oklahoma and American Federation of Government Employees, Local 2250*, 20 FLRA No. 48 (1985) (and cases cited in the decision). As noted, the Arbitrator in concluding that the Activity did not violate the parties' agreement specifically found that the grievant did not meet the minimum qualification requirements for promotion to GS-5. Accordingly, while we do not condone management's inequitable treatment of the grievant as found by the Arbitrator, we are constrained to conclude that the award denying the grievance is not deficient as alleged.

V. DECISION

Accordingly, the Union's exception is denied.

Issued, Washington, D.C., September 29, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

OVERSEAS FEDERATION
OF TEACHERS

Union

and

Case No. 0-NG-999

DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOLS
MEDITERRANEAN REGION

Agency

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute and section 2424.1 of the Authority's Rules and Regulations on a petition for review of negotiability issues filed by the Union. For the reasons indicated below, it has been determined that the Union's petition for review was untimely filed and must be dismissed on that basis.

From the record in this case it appears that on November 14, 1983, the Agency served on the Union by mail its allegation of nonnegotiability with respect to the four Union proposals here in dispute. Since, under section 7117(c) of the Statute and section 2424.3 of the Authority's Rules and Regulations, the time limit for filing a petition for review is fifteen days after the date the Agency's allegation is served on the Union, the Union's petition for review was due in the national office of the Authority on December 5, 1983. The Union's petition for review was not filed with the Authority until December 12, 1983 and so the Authority dismissed the case on the basis that it was untimely filed. Overseas Federation of Teachers and Department of Defense Dependents Schools, Mediterranean

Region, 13 FLRA 721 (1984), Request for Reconsideration denied, 15 FLRA 1047 (June 13, 1984).

On February 28, 1984, the Union again requested a written declaration of nonnegotiability from the Agency with respect to the same four proposals which had been subject to the dismissal referred to above. The Agency informed the Union that the Union's request was the same as that to which it had responded by its allegation in November, 1983, that it had stated its position to the Union at that time, and that it would not provide the Union with a new allegation. On May 14, 1984, the Union filed the instant negotiability appeal with the Authority seeking review of the four proposals. It claims that the appeal is timely under a proviso to section 2424.3 of the Authority's Rules and Regulations, which permits an appeal to be filed after an agency allegation is requested and the agency has failed to provide it.

The Authority has held that a union may file a petition for review of negotiability issues without a prior written agency allegation where the Union has requested such an allegation and the agency has failed to provide it. The requirement that a petition for review must be filed within 15 days from the date of service on the Union of an agency allegation of nonnegotiabilty does not apply in such circumstances. See, for example, National Treasury Employees Union and NTEU Buffalo District Joint Council and Internal Revenue Service, Buffalo District (and the cases consolidated therewith), 3 FLRA 337 (1980). The fact that the Union filed its petition for review on May 14, 1984, approximately seventy-five days after it had requested a written allegation from the Agency, would not, therefore, render its petition untimely and would not, in and of itself, provide a basis for dismissing the Union's appeal.

However, the record demonstrates that the Union's petition, in essence, seeks review of the Agency's earlier allegation, which the Agency provided to the Union in November, 1983. The Authority has held that "where a petition for review is filed concerning an agency's allegation of nonnegotiability which is only a restatement of a prior allegation, and no changes in the substance or language of the proposal have been effectuated during the period between allegations, the petition seeks review of the earlier allegation." American Federation of Government Employees, AFL-CIO, Local 1336 and Department of Health and Human Services, Social Security Administration, 21 FLRA No. 1

(1986). While, strictly speaking, the Agency did not in this case provide the Union with a second written allegation, it made clear to the Union that its position taken in the earlier allegation had not changed, reaffirming its previous position with respect to the four Union proposals at issue. Moreover, as already noted, the record indicates that the proposals in the present appeal were the same ones that had been subject to the Agency's November, 1983 allegation of nonnegotiability. There had been no change in either the substance or the language of the proposals between November, 1983, and February 28, 1984. Compare American Federation of Government Employees, AFL-CIO, Local 2303 and Metropolitan Washington Airports, Federal Aviation Administration, U.S. Department of Transportation, 17 FLRA 17 (1985), petition for review filed sub nom. American Federation of Government Employees, AFL-CIO v. Federal Labor Relations Authority, No. 85-1248 (D.C. Cir. April 25, 1985) (recombination of various parts of proposals previously declared nonnegotiable did not constitute a change in the substance or language of the proposals). It must be concluded that the substance of the dispute between the parties concerns the Agency's November, 1983, allegation that the four proposals are nonnegotiable. As noted above, the Union's first appeal, filed on December 12, 1983, was untimely. All the more so, the Union's second appeal from that allegation, filed with the Authority on May 14, 1984, was outside the time limits set forth in section 2424.3 of the Authority's regulations and, therefore, untimely.

ORDER

As the Union's petition for review was untimely filed, and apart from other considerations, it is hereby dismissed.

For the Authority,

Issued, Washington, D.C., September 29, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

23 FLRA No. 71

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION CENTRAL
OFFICE, WASHINGTON, D.C. AND VETERANS
ADMINISTRATION MEDICAL CENTER,
CINCINNATI, OHIO

Respondent

and

Case Nos. 5-CA-40056
5-CA-40059

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2031, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This consolidated unfair labor practice case is before the Authority on exceptions to the attached Chief Administrative Law Judge's Decision filed by the General Counsel. The Respondent filed an opposition to the General Counsel's exceptions. The consolidated complaint alleged that the Respondent, Veterans Administration Central Office, Washington, D.C. and Veterans Administration Medical Center, Cincinnati, Ohio, violated section 7116(a)(1), (5) and (8) of the Statute by refusing to grant official time for certain negotiations to agents of the Charging Party, American Federation of Government Employees, Local 2031, AFL-CIO (Local 2031), and by changing a past practice of granting such official time without providing Local 2031 with notice and an opportunity to bargain concerning such change.

II. Background

The Charging Party, Local 2031, is an agent of the American Federation of Government Employees, AFL-CIO which is the certified exclusive representative at the national level for a consolidated unit of nonprofessional employees at various Veterans Administration facilities throughout the country. Local 2031 functions as the local representative of some of the employees in the nationwide consolidated unit. As found by the Chief Judge, the charges in this case arose when a supervisory official of the Respondent, located in Cincinnati, Ohio, refused to grant requests for official time on two separate occasions to representatives of Local 2031 employed at his facility. The official time was requested to negotiate a local supplementary agreement on behalf of employees in the nationwide consolidated unit located at a separate facility, the Veterans Administration Outpatient Clinic, in Columbus, Ohio. The local supplemental agreement was provided for by the terms of the parties' master agreement.

The section 7116(a)(1) and (5) portion of the complaint alleged that the Respondent unilaterally changed a past practice of granting official time to Union negotiators for local bargaining. The Chief Judge noted that official time was granted for two sets of negotiations involving four days over a period of 26 months. One day was nonprecedential, and the other three were granted by an official under unusual circumstances detailed more fully in the Chief Judge's Decision.

III. Chief Administrative Law Judge's Decision

The Chief Judge concluded that the Authority's decision in Interpretation and Guidance, 7 FLRA 682 (1982), which determined that the official time provisions of section 7131(a) of the Statute do not encompass negotiations below the level of exclusive recognition which are designed to create local agreements to supplement a master agreement, is controlling in this case. The Chief Judge determined that the negotiations in this case were not encompassed by section 7131(a) and recommended that the alleged violations of section 7116(a) (1) and (8) of the Statute be dismissed.

The Chief Judge also concluded that application of the Authority's decision in Interpretation and Guidance, supra, rendered irrelevant the Respondent's contention that local Union representatives employed at one facility were not entitled to official time either statutorily or by the terms of the parties' Master Agreement to represent employees at a separate and independent facility where the Union representatives are themselves not employed. The Chief Judge also recommended that the section 7116(a)(5) allegation be dismissed. He noted that official time could become a condition of employment if it is consistently granted for an extended period with the knowledge and consent of responsible supervisors. He concluded that the General Counsel had failed to demonstrate that the authorization of official time for such bargaining had become a condition of employment by virtue of an established past practice under this standard.

IV. Positions of the Parties

The General Counsel excepts to the Chief Judge's finding that negotiations at the Columbus Outpatient Clinic were not encompassed by section 7131(a) because they were limited to that facility and were conducted by local officials. It also excepts to the finding there was no binding past practice for providing official time for Cincinnati-based representatives to negotiate with management of the Outpatient Clinic.

The Respondent's Opposition to Exceptions supports the findings and conclusions of the Chief Judge.

V. Analysis

The issue raised by this case is whether a unit employee who is not stationed at the site of the local supplemental negotiations is entitled to official time to represent the union. In our view, where the parties at the level of exclusive recognition have authorized local supplemental negotiations, section 7131(a) entitles any employee in the unit to official time to represent the union at local negotiations, unless the parties have agreed otherwise.1/

The language of section 7131(a) requires that "[a]ny employee representing an exclusive representative in the negotiation of a collective bargaining agreement . . . shall be authorized official time. . . ." (emphasis added) so long

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1/ In a case involving these same parties, the Authority dismissed section 7116(a)(1) and (8) allegations when V.A. Cincinnati denied official time, travel expenses and per diem allowances to three of its employees who represented the Union in negotiating a dues withholding agreement covering employees at the Outpatient Clinic in Columbus. The Authority reached this conclusion because the parties at the level of exclusive recognition had not agreed to authorize the local negotiations for a dues withholding agreement. Veterans Administration, Cincinnati, Ohio, 19 FLRA No. 19 (1985). The Authority referred to American Federation of Government Employees v. FLRA, 750 F.2d 143 (D.C. Cir. 1984), where the court held that a mutual obligation to bargain exists at the local level once the parties agree in the master agreement to such local negotiations, thus triggering the provisions of section 7131(a).

as such employee is in the bargaining unit involved. We have held that the official time provisions of section 7131(a) encompass the negotiation of local supplemental agreements, when authorized by the parties at the level of exclusive recognition. See Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 19 FLRA No. 17 (1985), decided subsequent to the issuance of the Chief Judge's Decision in this case. Our holding that the official time provisions of section 7131(a) encompass negotiation of local supplemental agreements followed the decision of the United States Court of Appeals for the District of Columbia circuit in AFGE v. FLRA, supra. In that case, the court reversed the Authority's decision in Interpretation and Guidance, supra. The court also noted that the Supreme Court, in BATF v. FLRA, 464 U.S. 89 (1983) "did not question the characterization of the negotiations of . . . local issues as 'collective bargaining,' and thus did not recognize the master-local distinction . . ." 750 F.2d at 147.

Pursuant to the plain language of the Statute and consistent with Authority precedent, any unit employee representing the union at local supplemental negotiations is entitled to official time regardless of whether the employee is stationed at the location which is the subject of local negotiations.2/ In the circumstances of this

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2/ This conclusion does not conflict with the Authority's decision in U.S. Naval Space Surveillance Systems, Dahlgren, Virginia, 12 FLRA 731 (1983), aff'd sub nom. American Federation of Government Employees, Local 2096 v. FLRA, 738 F.2d 633 (4th Cir. 1984). There it was held that an activity has no obligation under section 7131(a) to grant official time or under section 7131(d) to negotiate concerning the authorization of official time for any of its employees to represent the union in collective bargaining on behalf of employees of a separate and independent activity. Similarly, in United States Department of Defense, Department of the Air Force, San Antonio Air Logistics Center, Kelly Air Force Base, Texas, 15 FLRA 998 (1984), it was determined that an activity has no obligation under section 7131(a) to grant official time to an employee who is not a member of the bargaining unit involved in the negotiations. See also United States Air Force, 2750th Air Base Wing Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 7 FLRA 738 (1982).

case, it follows that the Respondent, located in Cincinnati, Ohio, denied a statutory entitlement to employees who requested official time to represent the Union at local supplemental negotiations on behalf of employees of the Outpatient Clinic in Columbus, Ohio, a part of the consolidated collective bargaining unit. Accordingly, the Respondent violated section 7116(a)(1) and (8) of the Statute.

The Authority finds it unnecessary to pass on the Chief Judge's conclusion that the Respondent did not violate section 7116(a)(1) and (5) of the Statute, as alleged, by unilaterally departing from a past practice of providing official time to its employees to serve as union representatives in bargaining with the Veterans Administration Outpatient Clinic. Inasmuch as official time under the circumstances is a statutory right pursuant to section 7131(a), the existence or nonexistence of a past practice is irrelevant.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Chief Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Chief Judge's Decision and the entire record in these cases, and adopts his findings and conclusions only to the extent that they are consistent with our decision.

We find that the Respondent violated section 7116(a)(1) and (8) of the Statute when it refused to provide official time to unit employees to represent the Union in local supplemental negotiations which was their right pursuant to section 7131(a) of the Statute.

Accordingly, we shall issue the following order to remedy the conduct found to have violated the Statute.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the

Authority hereby orders that the Veterans Administration Central Office, Washington, D.C., and Veterans Administration Medical Center, Cincinnati, Ohio, shall:

1. Cease and desist from:

(a) Refusing to grant official time pursuant to section 7131(a) of the Federal Service Labor-Management Relations Statute to its employees who are representatives of American Federation of Government Employees, Local 2031, AFL-CIO, in negotiations for local supplemental agreements authorized by the parties' master agreement.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action:

(a) Upon request of American Federation of Government Employees Local 2031, AFL-CIO, grant official time pursuant to section 7131(a) of the Statute to its employees who are representatives of the Union in negotiations for local supplemental agreements authorized by the parties' master agreement.

(b) Make whole unit employees who were denied official time to represent the Union in negotiations for a local supplemental agreement pursuant to the parties' master agreement and who were entitled to official time under the terms of section 7131(a) of the Statute.

(c) Post at its facilities at Veterans Administration Medical Center, Cincinnati, Ohio, and Veterans Administration Outpatient Clinic, Columbus, Ohio, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Director, Veterans Administration Medical Center, Cincinnati, Ohio, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region V, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with the Order.

Issued, Washington, D.C. September 30, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to grant official time pursuant to section 7131(a) of the Federal Service Labor-Management Relations Statute to our employees who are representatives of American Federation of Government Employees Local 2031, AFL-CIO, in negotiations for local supplemental agreements authorized by our master agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL upon request of American Federation of Government Employees Local 2031, AFL-CIO, grant official time pursuant to section 7131(a) of the Statute to our employees who are representatives of the Union in negotiations for local supplemental agreements authorized by our master agreement.

WE WILL make whole unit employees who were denied official time to represent the Union in negotiations for a local supplemental agreement pursuant to our master agreement and who were entitled to official time under the terms of section 7131(a) of the Statute.

____
(Activity)

Dated:_______________ By:______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region V, Federal Labor Relations Authority, whose address is: 175 W. Jackson Blvd., Suite 1359-A, Chicago, IL 60604, and whose telephone number is: (312) 353-6306.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

VETERANS ADMINISTRATION CENTRAL
OFFICE, WASHINGTON, D.C. AND
VETERANS ADMINISTRATION MEDICAL
CENTER, CINCINNATI, OHIO

Respondent

and

Case Nos. 5-CA-40056
5-CA-40059

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2031, AFL-CIO

Charging Party

Russell C. Henry, Esquire
For the Respondent

John Gallagher, Esquire
Arlander Keys, Esquire
For the General Counsel
Federal Labor Relations Authority

Before: JOHN H. FENTON
Chief Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5, U.S. Code, 5 U.S.C. § 7101 et seq. It arose upon the filing of unfair labor practice charges by Local 2031, AFGE, on November 17 and 18 and amended charges filed on December 12, 1983. The Complaint and Notice of Hearing was issued by the Regional Director of FLRA's Chicago Region on January 31, 1984. At issue are whether Respondent unlawfully refused to grant official time to agents of Local 2031 who participated in negotiations, and whether it abandoned a past practice of granting such time without providing the Union with notice and an opportunity to bargain concerning such change.

A hearing was held on April 9, 1984, in Cincinnati, Ohio. The parties were afforded full opportunity to adduce evidence and to examine and cross-examine witnesses. Upon the entire record I make the following findings.

Findings of Fact

The Veterans Administration Medical Center in Cincinnati, Ohio (the Medical Center) and the Veterans Administration Outpatient Clinic in Columbus, Ohio (the Outpatient Clinic) are separate and distinct facilities within the Veterans Administration. Each has its own Director, budget and mission, and functions independently of the other. They are about 100 miles apart. On February 28, 1980, the American Federation of Government Employees, AFL-CIO, (AFGE) was certified as the exclusive bargaining representative of a unit of nonprofessional employees at various locations throughout the country, including the Medical Center. On October 16, 1980, AFGE was certified as the exclusive representative of nonprofessional personnel at the Outpatient Clinic, and they became a part of the nationwide consolidated unit, which includes about 115,000 employees at over 225 facilities.

On March 13, 1980, shortly after the consolidation occurred, AFGE's Director of its Contract and Appeals Division wrote VA's Director of Labor-Management Relations Service, informing him that the "National Office is the level of the exclusive recognition and as such is the appropriate party for the Agency to notify whenever any changes are proposed anywhere in the unit at any level." He also designated the officers of the National VA Council as AFGE's representatives for the purpose of negotiating any changes in personnel policies, practices and regulations. In a companion letter of the same day, he acknowledged the inconvenience of negotiating all proposed changes at any level solely at the new level of national recognition, and expressed AFGE's willingness to discuss alternatives.[1]

On October 22, 1980, shortly after the Outpatient Clinic was added to the consolidated unit, AFGE National Vice President Kenneth Walsh wrote Personnel Officer James Doherty of the Outpatient Clinic, designating President Lonnie Carter of Local 2031 and Vice President Robert Barker of Local 2031 as representatives of the Outpatient Clinic employees in Columbus.[2] Both are employees of the Cincinnati Medical Center. On

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[1] I reserved ruling on the admissibility of these two documents. They are hereby admitted as Respondents Exhibits 1 and 2.

[2] Walsh said that, "[i]n the very near future, Local 2031 will be nominating and electing stewards to represent employees in Columbus, Ohio, on day to day problems."

February 12, 1982, Walsh again designated Carter as the representative for Outpatient Clinic employees and named Barker and Secretary-Treasurer Brenda Smith as alternate representatives.

On June 24, 1981, Carter, Barker and Smith negotiated, in Cincinnati, with the Columbus Personnel Chief, regarding a merit promotion plan for Columbus Outpatient Clinic employees. They were granted official time. However, a memorandum of understanding signed that day by the Union officials and the Personnel Chiefs for the Medical Center and the Outpatient Clinic recites that the grant of official time would set no precedent because the Columbus Chief came to Cincinnati, and that Local 2031 "reserves the right for official time" for meetings with Outpatient Clinic management in Columbus. These negotiations continued, in Columbus, on July 15, 16 and 17 and were broadened to include a safety program and EEO policy. Official time was approved for this purpose by Sidney Stell, Acting Labor Relations Officer of the Medical Center, for President Carter and Secretary-Treasurer Smith.

There were no other negotiations between AFGE and Columbus Outpatient Clinic management until August 31 and September 1, 1983. They were initiated by Acting Personnel Officer Eleanor Farington and dealt with revisions in policies concerning safety, the Employee Attitude Committee, Employee Assistance and Official Time. Farington's letter to Carter expressly stated that two Union negotiators would be afforded official time by stating that there would be two negotiators present for management, and that the two observers requested by the union would be limited to five hours each for the ten hours scheduled for negotiations. As was the custom because the two facilities are separate, Carter applied for official time for such purpose to Labor Relations Officer Francis J. Wyborski of the Medical Center. On August 30, Wyborski denied Carter's request on the ground that the Outpatient Clinic is a separate facility under its own management, that the Medical Center has no employees at the Clinic, and that the "Master Agreement does not provide for official time for employees to travel between facilities to engage in union activities."[3]

Farington initiated further negotiations for November 1, 1983, and Carter again sought official time for himself and Smith. On October 27, Acting Labor Relations Officer Sidney Stell denied the request on the ground that neither "the Master Agreement nor the Local Supplemental Agreement authorizes official time for local union representatives to participate in negotiations at another facility which is not under the control of the VA Medical Center, Cincinnati, Director." On November 1, Carter and Smith negotiated the Outpatient Clinic's absence and leave policy. The Medical Center placed them on leave without pay for the period of such absence.

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[3] The Master Agreement relied upon by management in denying official time became effective on August 13, 1982, one year after the negotiations for which official time was authorized and a year before the negotiations for which it was denied.

The Master Agreement contains a number of provisions relevant to the question whether Carter and Smith, as employees of the Cincinnati Medical Center, are entitled to official time for their participation in negotiations at the Columbus Outpatient Clinic. Thus, the "parties" to the contract are defined in the Preamble as the Veterans Administration (Agency) and the American Federation of Government Employees/National Veterans Administration Council of Veterans Administration Locals (Union). Article 2 defines Union as AFGE, as represented by the Council at the National level or by a single local at the individual field facility level, and defines Employer as VA Central Office at the national level or local management at the individual field facility level. In addition "individual facility" is defined in Article 2, Section 3, as any establishment which is under the direction of local management officials, so as to make it clear that the Medical Center and the Outpatient Clinic are separate facilities. Article 4, entitled Mid-term Bargaining, describes National Level Negotiations, Local Bargaining on National Changes and Local Level Changes. It provides that all VA-initiated changes above the individual facility level will be forwarded to the designated Council Representative and that the parties will negotiate national level changes in Washington, D.C. Four Council representatives are to receive official time and per diem for such negotiations and for preparing for them.

Section 4, entitled Local Bargaining on National Changes, states that:

> On all policies and directives or other changes for which the VA meets its bargaining obligations at the national level, local bargaining at individual facilities will be restricted to local implementation unless there was agreement at the national level to provide for local bargaining on the national subject. Local union representatives shall receive official time for all time spent in mid-term negotiations as provided under 5 U.S.C. § 7131(a).

Section 5, entitled Local Level Changes, states that:

> Proposed changes affecting personnel policies, practices or conditions of employment which are initiated by local management at a single facility will be forwarded to the designated local union official. Upon request, the parties will negotiate as appropriate. The Union representative shall receive official time for all time spent in negotiations as provided under 5 U.S.C. § 7131(a).

Article 5 concerns Local Supplemental Agreements. It permits local bargaining on subjects which are not covered by the Master Agreement, or which will not bring about a conflict with that agreement's provisions or impair its implementation. It provides for negotiation of one local supplement to the controlling Master Agreement at the request of either party and gives union negotiators limited amounts of official time for such purpose.

Article 8 provides specific amounts of official time for the National VA Council President, the two Vice Presidents and the 15 District Representatives for their representational activities. In Section 5 it provides that:

> Official time for local union officers and/or stewards will be a proper subject for local supplemental bargaining.

Section 1 thereof, in Note 2, requires that Union officials obtain prior clearance from the Personnel Officer before engaging in any representational activity at a facility other than where they are employed.

The Parties' Position

The General Counsel contends that the failure to place Local 2031 President Lonnie Carter and Secretary-Treasurer Smith on official time for the negotiations on August 31, September 1 and November 1, at the Outpatient Clinic constituted noncompliance with Section 7131(a) and therefore violated Section 7116(a)(1) and (8). The General Counsel also contends that the same conduct constituted a unilateral change in an established practice of granting official time to employees of the Cincinnati Outpatient Clinic management, in violation of Section 7116(a)(1) and (5).

With respect to the first alleged violation, the General Counsel acknowledges that the right to official time set forth in Section 7131(a) does not encompass negotiations which occur below the level of exclusive recognition and are designed to fashion local agreements supplementing a national, controlling agreement.[4] However, the General Counsel argues that the instant negotiations were mid-term negotiations "which took place at the level of recognition between management representatives of the Outpatient Clinic and AFGE's duly designated representatives." Thus, in essence, the General Counsel contends that these negotiations were conducted pursuant to Article 4, Section 5, which has to do with Mid-term Bargaining of Local Level Changes. That Section directs local management to forward proposed changes to the designated local union official and provides that the "parties" will, upon request, negotiate as appropriate," with official time entitlement flowing to the union representatives. As the term "parties" is defined in the preamble as VA and AFGE/National VA Council of VA Locals, the General Counsel asserts that the contract recognizes that these negotiations were conducted by local management officials, as agents of VA and local union officials as agents of AFGE/Council. Thus their status as officers of Local 2031 is but a confusing irrelevancy, and they are by law entitled to official time for negotiations which took place at the national level of exclusive recognition. As best I understand it, I take the General Counsel to be arguing that negotiations pursuant to Article 4, Section 5, fit within the rubric of negotiations at the level of exclusive recognition subject to official time as described by the Authority in Interpretation and Guidance (7 FLRA 682):

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[4] Interpretation and Guidance, 7 FLRA 682

> However, it should be emphasized that the official time provisions of Section 7131(a) do encompass negotiations at the level of exclusive recognition including negotiation of "local issues" as part of the national or controlling (master) agreement.

With respect to the second alleged violation, the General Counsel contends that the granting of official time for the negotiations on June 24 and July 15, 16 and 17, 1981, ripened into a condition of employment, i.e. it was a practice "consistently exercised for an extended period with the knowledge and consent of responsible supervisors." It therefore could not be changed, as it undeniably was, without first affording the Union an opportunity to engage in bargaining.[5]

Respondent's major defense is that the language of the Master Agreement, with its repeated references to "single facilities," to "local issues" and to "local representatives" was meant to permit bargaining below the level of recognition, only on issues confined to a single facility, i.e. that local bargaining takes place between the managers of a single facility and union representatives who are "local," i.e. who are employed at that facility. Pointing to its intention to end the work disruptions, and the travel and per diem costs which then attended movement of Union representatives from one facility to another under the Authority's construction of the Statute, Respondent asserts that the Master Agreement was designed to structure labor management relations so that national issues would be handled by officers of the VA Council and

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[5] Again, I take it that this is an alternative theory of violation which would apply only in the event that Section 7131(a) is found inapplicable to these negotiations. If the union representatives were entitled to official time as a statutory grant, then it is difficult to understand what bargaining obligation Respondent would have to discharge. There would, of course, be a clear unilateral change, i.e. a change without any notice or discussion, but there could be no obligation to bargain in good faith about the Respondent's willingness to comply with Congress' mandate.

District Representatives, and local issues would be handled by local officials who were employed at the single and separate facility to be covered by the negotiations. It points to no evidence of agreement on such a structure, except for the contract's language, asserting that "pure and simple logic dictates" that permitting local representatives to handle matters at more than one facility creates an "intermediate level of activity . . . (which) . . . was not part of the negotiated scheme and is contrary to the Master Agreement."

Notwithstanding this argument, Respondent in fact did not refuse (and is not accused of refusing) to recognize Carter and Smith as the designated Union representatives for the Columbus negotiations (although it now argues they were not properly designated). Rather, it argues that they were not entitled to official time for such negotiations (even though Columbus management had indicated it would be available) because the contract makes no provisions for bargaining away from the union representative's facility. As an alternative much less vigorously pursued, it contends that Section 7131(a) does not grant official time for local bargaining, and that these negotiations, whether they arose pursuant to Article 4, Section 5 or to Article 5, Section 2, were local in nature and thus below the level of exclusive recognition necessary for official time entitlement. In this respect it asserts that there is no meaningful distinction between the two sections of the national contract: each would yield a supplemental agreement resolving local issues and each is therefore concerned with local bargaining. It follows, says Respondent, that the issue of entitlement to official time is governed by Section 7131(d), which consigns the matter to negotiations, and thus converts this dispute to one of contract interpretation for resolution by an arbitrator rather than FLRA.

On the issue of unilaterally ending a practice of granting official time for such negotiations, Respondent again contends that the Master Agreement eliminated any requirement to bargain concerning conditions of employment at the Outpatient Clinic. Thus there can be no refusal to bargain over a practice which the Union has bargained away, and the question whether there was an established practice becomes irrelevant.

Discussion and Conclusions

The alleged violation of Section 7116(a)(1) and (8) is based on Section 7131(a), which requires that "any employee representing an exclusive representative in the negotiation of a collective bargaining agreement . . . shall be authorized official time for such purposes . . . during the time the employee otherwise would be in a duty status."

A literal reading of such language, standing alone, would strongly suggest that local union negotiators, bargaining pursuant to the agreement of the parties to collective bargaining at the national level of exclusive recognition, would be "representing an exclusive representative in the negotiation of a collective bargaining agreement" and therefore "shall be authorized official time for such purposes . . . ." The logistics of national bargaining and the presence of myriad local problems which are most sensibly and economically resolved at the local level by negotiators most familiar with them and their ramifications in that segment of the unit, virtually dictate that national agreements will provide for local negotiation of supplementary agreements. As noted, nothing in Section 7131(a) suggests that Congress intended that such a practical accommodation to the realities of bargaining at many and disparate working locations would preclude entitlement to official time. However, the Federal Labor Relations Authority has construed such language, in the light of other provisions of the Statute, as limiting entitlement to negotiating time spent at the level of exclusive recognition.

In Interpretation and Guidance, 7 FLRA 682, the Authority was confronted with the question whether Section 7131(a) applies to negotiation of a local agreement which supplements a national or controlling (master) agreement. Quoting from Section 7103(a)(12) of the Statute, and underscoring its most significant language the Authority said:

> Thus entitlement to official time under Section 7131(a) of the Statute flows to any employee representing an exclusive representative in the negotiation of a "collective bargaining agreement," which "is any agreement that is entered into as a result of the performance of the mutual obligation of the parties to bargain in a good-faith effort to reach agreement with respect to conditions of employment affecting employees in the appropriate unit." Hence, unless what is being negotiated meets this definition of "collective bargaining agreement," the official time provisions of section 7131(a) do not apply.
>
> Parties at the level of exclusive recognition, who are under the mutual obligation to bargain with respect to conditions of employment affecting employees in an appropriate unit, may agree to authorize representatives below the level of recognition to supplement provisions of the national controlling master agreement. Thus, local supplemental agreements are negotiated voluntarily pursuant to the agreement of the parties at the level of exclusive recognition and not pursuant to a "mutual obligation" to bargain.
>
> Accordingly, the official time provisions of section 7131(a) . . . do not encompass negotiations below the level of exclusive recognition which are designed to

> create local agreements to supplement a national or controlling (master) agreement. However, it should be emphasized that the official time provisions . . . do encompass negotiations at the level of exclusive recognition, including negotiation of "local issues" as part of the national or controlling (master) agreement.

Thus, the Authority has clearly said that the mutual obligation to bargain exists here only at the national level, and that any arrangement there made for the resolution of local issues through local bargaining of supplemental agreements creates voluntary bargaining to which no official time entitlement attaches. I take the emphasis placed on the phrase "in the appropriate unit" to mean that bargaining can only be deemed to occur at the national level if the agenda includes terms and conditions of employment which affect the entire unit, i.e. it is coextensive with the unit. I base this inference on the fact that bargaining which concerns any segment of a unit obviously also arises in a unit, and affects terms in the unit. The Authority must have meant more -- that only the negotiations at the national table discharge the mutual obligation to bargain and therefore carry the right to official time. Put another way, the national negotiators cannot provide for their agents at a lower level to bargain about problems more limited in scope than the unit itself, for an agreement which would become a part of, or an amendment to, the controlling agreement, and thereby delegate downward the mutual obligation to bargain and the concomitant right to official time for the employees representing the union.

I make this effort to deal with the semantic confusion engendered by the terms employed because it is my conclusion that such arrangements are precisely what this national agreement attempted to create. The national agreement, in Article 5, explicitly provides for "negotiations below the level of exclusive recognition which are designed to create local agreements to supplement a national agreement." Were it clear that the Columbus negotiations were intended to result in a "local supplementary agreement," the inquiry would be over. Such negotiations are quite literally covered by the Authority's above-quoted language, and they clearly would not be encompassed by Section 7131(a).

It is not clear, however, that the Columbus bargaining was pursuant to Article 5, as opposed to the "local" bargaining provisions of Article 4. That Article addresses mid-term bargaining, and by its terms would appear to affect the national agreement. In addition, it provides for regular reopening whereas a local supplementary agreement can be negotiated only once. It literally provides in Section 4 for "Local Bargaining on National Changes" where there was agreement at the national level for local bargaining on a national subject. It also provides for official time "as provided under 5 U.S.C. § 7131(a)." In Section 5 it deals with

"Local Level Changes," and provides that proposed changes initiated by local management at a single facility are to be forwarded to the designated local union official and that, upon request, "the parties" will negotiate as appropriate. Recall that the General Counsel hangs his hat on this last quote, contending that "the parties," as defined in the controlling agreement, are the VA and the AFGE/National VA Council, and that negotiators operating under Section 5 not only represent those parties (as would always be the case), but are, by operation of law, "the parties" so as to elevate the negotiations which in fact are conducted at the local facility by local officials to the national level. Note further that Section 5 also provides for union negotiators to receive official time "as provided under 5 U.S.C. § 7131(a)," indicating that the parties believed (or desired) that Section to apply.

If Sections 4 and 5 of Article 4 were designed to create local supplemental agreements (and we do not know how such bargaining would be memorialized) then they would duplicate Article 5. In order to avoid redundancy, and to recognize that both Section 4 and Section 5 are in an Article which describes the procedures for mid-term modification of the controlling agreement, I conclude that they contemplate negotiations which look to amendment of the controlling agreement. I assume that Section 5 governs here if Article 5 does not, since those negotiations were initiated by local management and were limited to terms and conditions at a single facility. Because Article 5 permits local bargaining only on matters not covered by the National Agreement, and Article 4, Section 4 permits "local" bargaining only on "a national subject" which the parties at the national level have agreed may be negotiated at the local level, I conclude that Article 4, Section 5 must have to do with the only subject left uncovered: matters governed by the national agreement which management wishes to change at a single location. If it is not designed to deal with such matters, I fail to see its purpose. Perhaps, as the General Counsel's argument suggests, the intent was that the local union representative was merely to receive such proposals, and any bargaining was then to take place between the national negotiators named by the controlling agreement. Perhaps, as General Counsel actually argues, local negotiators were then to substitute for their national level counterparts, so as to elevate what appears to be local bargaining conducted at a single facility to the national level of exclusive recognition.

My reading of Interpretation and Guidance, supra, requires a finding that, even if the parties intended to raise bargaining of the kind contemplated by Article 4, Section 5, to the national level, so as to be encompassed by Section 7131(a), they are powerless to do so. I feel constrained to come to this conclusion because of the analysis I have already made of the literal meaning and the sense of the Authority's decision. To recapitulate, the Authority held that Section 7131(a) encompasses negotiations "at the level of exclusive recognition, including negotiation of 'local issues' as part of the . . . controlling agreement" (Emphasis mine). The converse is that local issues which are not negotiated as part of the overall negotiations are excluded from such coverage. Thus, national bargaining that does not resolve local issues, but instead provides for their later resolution at some lower level cannot operate to shift the level of recognition downward so as to create "local negotiations" which are conducted "in an appropriate unit" pursuant to the "mutual obligation to bargain." The Authority's holding that negotiations for local supplemental contracts are "voluntary" in nature must control the result here, unless a meaningful distinction can be drawn between local bargaining which "supplements" a master agreement and local bargaining which changes or "amends" a master agreement. In the light of the Authority's guidance the difference appears to be more semantic than real. In either instance local agents of the national parties are permitted to flesh out or change the controlling agreement as it applies to a particular locality. Such negotiations thus run counter to, or offend, the very same notions of collective bargaining that led the Authority to reject the contention that local supplemental bargaining should be covered by official time. Thus, they in fact also occur at a level below that of exclusive recognition and are concerned with employment conditions affecting only a part of the appropriate unit. They are functionally the same. By definition, the combination of low level of discussion and narrow focus of impact renders such negotiations "voluntary", and thus precludes the application of Section 7131(a) because such "discussions" do not discharge the mutual obligation to bargain concerning terms affecting employees in an appropriate unit.

It follows that the negotiations at the Columbus Outpatient Clinic were not encompassed by Section 7131(a), as they were limited to that facility and were conducted by local union officials. For the same reasons the questions whether those officials were duly designated representatives of AFGE/VA National Council, and whether they could in any event represent employees at a facility where they do not work, are rendered irrelevant. I therefore recommend that the allegations of violations of Section 7116(a)(1) and (8) be dismissed.6/

6/ None of this addresses the question whether Respondent breached a clear contractual commitment to make "local bargaining on national subjects" subject to official time. The General Counsel did not allege an unfair labor practice founded in breach of contract, rather he alleged a statutory violation based on a contract provision which allegedly elevated the instant bargaining to the level of exclusive recognition.

Finally, I find no merit to the allegation that Respondent has unilaterally departed from a practice of granting official time to union negotiators for local bargaining, in violation of Section 7116(a)(1) and (5).

Official time for such purposes can, of course, become a condition of employment. But that only occurs if a practice of doing so is consistently exercised for an extended period with the knowledge and consent of responsible supervisors. See Department of Defense, Department of the Navy, Polaris Missile Facility, Atlantic, Charleston, South Carolina, 6 FLRA 372. The practice here in question involved high-ranking personnel and labor relations officials. It consisted of:

1. Negotiations on June 24, 1981, for which official time was provided by the Personnel Chief, expressly on the ground that the bargaining took place in Cincinnati and would not set a precedent for future Columbus negotiations.

2. Negotiations on July 15, 16 and 17, 1981 for which official time was provided by the Acting Labor Relations Director.

3. Negotiations on August 31, September 1 and November 1, 1983, for which official time was refused.

Thus, official time was, in fact, granted for two sets of negotiations (involving four days) which occurred over the course of some 26 months prior to the refusal. One day was nonprecedential, and the other three were covered by a grant from an official, in an acting capacity, who appears to have acted inconsistently with his absent superior's written reservations in the earlier instance. At best, two sets of negotiations can be viewed as having been covered by official time. This is hardly a consistent exercise over an extended period. Nor is the rather regular grant of official time for other representational purposes relevant. Respondent did so until the 1982 execution of the Master Agreement. It never drew the line, as it did on one of the two occasions here, at such travel for representational reasons. I would therefore not find a practice of providing official time for Cincinnati-based representatives to handle grievances and like matters in Columbus to constitute a binding practice respecting negotiations. Accordingly, I also recommend that the Section 7116(a)(1) and (5) allegation be dismissed.

In view of these findings and conclusions, it is recommended that the Authority issue the following Order pursuant to 5 C.F.R. § 2423.29:

ORDER

IT IS HEREBY ORDERED that the consolidated complaint in Case Nos. 5-CA-40056 and 5-CA-40059 be dismissed in its entirety.

John H. Fenton
JOHN H. FENTON
Chief Administrative Law Judge

Dated: December 6, 1984
Washington, D.C.

9/Case No. 396

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 396 REPORT OF CASE DECISIONS October 7, 1986

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UNFAIR LABOR PRACTICE CASE

23 FLRA No. 77 (September 30, 1986)

American Federation of Government Employees, Local 3511, AFL-CIO and Veterans Administration Audie L. Murphy Memorial Veterans Hospital, San Antonio, Texas, Case No. 6-CO-50043

NEGOTIABILITY CASES

23 FLRA No. 72 (September 30, 1986)

Hawaii Federal Employees Metal Trades Council, AFL-CIO and Pearl Harbor Naval Shipyard, Case No. O-NG-1303

23 FLRA No. 73 (September 30, 1986)

National Association of Government Employees, Local R3-84-SEIU, AFL-CIO and District of Columbia Air National Guard, Case No. O-NG-1237

23 FLRA No. 74 (September 30, 1986)

National Association of Government Employees, SEIU, AFL-CIO and Veterans Administration Medical Center Brockton/West Roxbury, Ma., Case No. O-NG-1142

23 FLRA No 75 (September 30, 1986)

National Association of Government Employees, Local R14-77 and Veterans Administration Medical Center, Grand Junction, Co., Case No. O-NG-1204

23 FLRA No. 76 (September 30, 1986)

American Federation of Government Employees, AFL-CIO, HUD Council 222 and Department of Housing and Urban Development, Case No. O-NG-887

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ARBITRATION CASES

23 FLRA No. 78 (October 7, 1986)

U.S. Department of Justice United States Marshals Service and International Council of U.S. Marshals Service Locals, AFGE (Hewitt, Arbitrator), Case No. 0-AR-977

In the following arbitration cases, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

September 29, 1986

0-AR-1137 0-AR-1158 0-AR-1160 0-AR-1190

0-AR-1212

October 7, 1986

0-AR-1214 0-AR-1217 0-AR-1227

Federal
Labor Relations
Authority

23 FLRA No. 72

Hawaii Federal Employees
Metal Trades Council and
Pearl Harbor Naval Shipyard,
Case No. 0-NG-1303 (Decided
September 30, 1986)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Procedure
    Timeliness

STATUTE

7105(a)(2)(E)
7117(c)(2)

DIGEST NOTES

Under § 7117(c)(2) of the Statute and § 2424.3 of the Authority's Rules and Regulations, the time limit for filing a petition for review of negotiability issues is 15 days after service on the union of the agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained. Further, under § 2429.23(d) of the Authority's rules of procedures, the time limit established in § 7117(c)(2) may not be extended or waived by the Authority. The union's petition for review was dismissed as untimely filed because it failed to comply with the provisions of the Statute and the Authority's rules and regulations, applicable to the computation of time limits.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

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Federal Labor Relations Authority

23 FLRA No. 73

NAGE, Local R3-84, SEIU and District of Columbia Air National Guard, Case No. 0-NG-1237 (Decided September 30, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Conditions for Review
    - Proposal Alleged to be Inconsistent With 32 U.S.C. § 709
  - National Guard Technicians
    - Maintenance of Military Status
      - Technicians' Representational Activity Does Not Concern the Performance of Technician Duties or Affect Military Status 32 U.S.C. § 709
    - Uniform Requirement
      - Exemption for Employees Performing Representational Activity
  - Official Time
    - Preparation for Labor-Management Activity
      - National Guard Technicians
        - Time to Change From Military to Civilian Attire
  - Subjects of Bargaining
    - At Election of Agency
      - Methods and Means of Performing Work
        - National Guard Technicians
          - Representational Activity Not Performance of Technician Duties
          - Uniforms
- Technician Personnel Regulation, Section 302.7

STATUTE

7105(a)(2)(E)
7106(b)(1) and (3)

DIGEST NOTES

A proposal which exempts National Guard Technicians from the agency's uniform requirement during the performance of representational activity, does not conflict with the agency's rights to determine the methods and means of performing work under § 7106(b)(1). The Authority held that the proposal's exceptions to the agency's uniform requirement concerned labor-management activity--the joint efforts of employees, the union, and the agency's management officials in setting and administering technicians' conditions of employment. The activities do not constitute employee performance of technician duties and thus, does not conflict with management's rights to determine the method and means of performing such duties. The Statute protects the rights of employees to serve as union representatives in order to promote the public interest in collective bargaining. To achieve that objective, the Statute frees employees functioning as union representatives from many of the the constraints to which they would otherwise be subject as employees so as to enable them to represent the interests of the bargaining unit. The Authority further held, that (1) the union's proposal did not conflict with 32 U.S.C. § 709, which mandates that technicians must maintain military status in the National Guard to retain technicians positions, because the proposal did not concern the performance of technicians duties and did not in any way affect unit employees' military status; and (2) the agency's purpose in imposing the uniform requirement would not be furthered by applying the requirement to technicians when they are involved in labor-management activities.

A proposal which provides that National Guard Technicians will have time to change from military to civilian attire when they shift between technicians' duties and labor-management activity is negotiable. The proposal complemented another proposal which exempted technicians involved in labor-management activity from the agency's uniform requirement. The Authority held that the proposal was similar to proposals which provide official time for union representatives to prepare for labor-management relations activities.

Federal Labor Relations Authority

23 FLRA No. 74

NAGE, SEIU and VA Medical Center, Brockton/West Roxbury, MA, Case No. 0-NG-1142 (Decided September 30, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Management Rights
    - Assign Work
      - Official Time
        - Proposal Allows Accomodations for Scheduling of Work and Official Time
  - Official Time
    - Internal Union Business
      - Representational Activity Not Internal Union Business
    - Representational Activities
      - Anticipated Abuse of Official Time Does Not Change Status of Negotiable Subject of Bargaining
    - To Expedite Grievance Matters

STATUTE

7105(a)(2)(E)
7106(a)(2)(B)
7117(c)
7131(a), (b) and (d)

DIGEST NOTES

A proposal which provides that a union officer will be granted official time to enable her to expedite all matters of a grievable nature is negotiable and does not concern internal union business. The Authority held that with certain limitation, an agency and a union must negotiate on the amount of official time available for an employee representing that union. One of the limitations is the prohibition in § 7131(b) against conducting internal union business on official time. The definition of internal union business is narrowly drawn, however, and relates to the institutional structure of the union. Activities involving labor-management contacts, as well as preparation for them, are not internal union business. Official time for union representatives to engage in contract negotiations--over and above the official time to which they are otherwise entitled for that purpose under § 7131(a)-- and to prepare for such negotiations is negotiable under § 7131(d). The union's proposal specifically addresses official time for the activities of its Secretary so as to enable her to expedite all grievable matters. Participation in grievance proceedings and preparation for them do not relate to the institutional structure of the union. They are at the heart of the representational activities for which official time may be negotiated. Further, an agency cannot remove a negotiable item from the bargaining table because it expects it to be abused. Other proceedings are available to remedy such abuse if it occurs.

A proposal which provides that a union officer will granted official time to enable her to expedite all matters of a grievable nature does not interfere with management's rights to assign work under § 7106(a)(2)(B). While authorizing official time for representational purposes necessarily affects management's ability to assign work, there is nothing in the union's proposal that would permit the union's secretary to use official time authorized by the proposal so as to disregard the needs of the agency to assign work to her at particular times. The proposal would not prevent the agency from making whatever accommodations may be necessary between the scheduling of work assignments and the scheduling of official time.

Federal Labor Relations Authority

23 FLRA No. 75

NAGE, Local R14-77 and VA Medical Center, Grand Junction, CO, Case No. 0-NG-1204 (Decided September 30, 1986)

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Management Rights
    Assign Work
      Official Time
      Specifically Scheduled Hours In Union Office
  Official Time
    Representational Activity
      Anticipated Abuse of Official Time Does Not Change Status of Negotiable Subject of Bargaining
    Union Representative Covered By Master Agreement In Negotiation of Supplemental Agreement
      Representative Performs Duties on Behalf of Other Bargaining Unit Members

STATUTE

7105(a)(2)(E)
7106(a)(2)(B)
7117
7131(b) and (d)

DIGEST NOTES

A proposal which provides for specifically scheduled hours in the union office on a weekly basis for the union president and the chief steward and which also provides that the parties are to "work out" the scheduled times in the future, does not interfere with management's rights to assign work under § 7106(a)(2)(B). The agency contended that the proposal removed its discretion to assign work since it requires specifically scheduled hours to perform representational duties. The Authority held that while the proposal calls for the union officers to be granted specifically scheduled hours in the union office, it also provides that the parties will work out scheduled times in the future. Thus, the proposal does not itself schedule which hours the union officers will spend in the union office. Rather, the proposal allows the parties to make adjustments as necessary. The Authority found that the agency's claim was merely speculative and that it failed to show that the use of official time under the proposal will interfere with the assignment or accomplishment of its work.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

A proposal which provides for specifically scheduled hours in the union office on a weekly basis for certain union officers is not inconsistent with § 7131(d). Section § 7131(d) authorizes the negotiation of official time for labor-management related representational matters such as contract administration, participation in grievance arbitration and the like. The Authority found that the proposal specifically provides that only representational duties will be performed during the times scheduled in the union office. The proposal is clearly consistent with the requirements of § 7131(d). Further, an agency cannot remove an otherwise negotiable proposal from the bargaining table simply because the agency expects that, if agreed upon, the proposal would provide the opportunity for some abuse. Such speculation provides no basis for finding a proposal nonnegotiable.

A proposal concerning official time for union representatives is negotiable eventhough the union representative to which it applies is not covered by the supplemental agreement sought to be negotiated. Under § 7131(d) a union representative is entitled to official time to represent fellow bargaining unit employees in an amount the parties agree to be reasonable, necessary and in the public interest. The Authority held that although the union representative is not himself covered by the supplemental agreement, he is a member of a bargaining unit (covered by a master agreement) to which the supplemental agreement and the disputed proposal would apply. Thus, the proposal is negotiable insofar as it grants the union representatives official time to perform representational duties on behalf of other members of the bargaining unit of which they are members.

23 FLRA No. 76

AFGE, HUD Council 222 and
HUD, Case No. 0-NG-887
(Decided September 30, 1986)

Federal
Labor Relations
Authority

SUBJECT MATTER INDEX ENTRIES

Negotiability
  Competitive Areas
    Reduction-In-Force
  Conditions of Employment
    Non-Unit Employees
      Competitive Areas
5 CFR 351.402(b)
51 Fed. Reg. 318, 321 (1986)

STATUTE

7105(a)(2)(E)

DIGEST NOTES

Two proposals concerning the establishment of competitive areas for reduction-in-force purposes are nonnegotiable. The Authority has determined in circumstances where OPM regulations setting forth the criteria for defining competitive areas were applicable, that as a practical matter most competitive areas sought to be bargained would of necessity contain non-unit employees. As proposals seeking to define competitive areas would thereby directly determine the working conditions of non-unit employees, such proposals would be outside the duty to bargain. The agency herein, has alleged--without contradiction--that both proposals in dispute would, because of the application of OPM regulations, directly affect the working conditions of non-unit employees. The proposals are therefore outside the duty to bargain.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

23 FLRA No. 77

Federal Labor Relations Authority

AFGE, Local 3511 and VA, Audie L. Murphy Memorial Veterans Hospital, San Antonio, Tex., Case No. 6-CO-50043 (Decided September 30, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practice	7116(b)(1), (5) and (8)
Union Violations	7122(a) and (b)
Failure to Comply With Arbitration Award	
Refusal to Comply with § 7122	
Remedy	
Fully Comply With Arbitrator's Award	
Contact Television Stations - Request Announcements	
Place Local Newspaper Advertisements	

DIGEST NOTES

The Authority held that the union violated § 7116(b)(8) when it failed and refused to comply with the requirements of § 7122 by refusing to fully implement an arbitration award after its exceptions to the arbitrator's award had been denied by the Authority. The Authority held that there was no question as to whether the union had complied with the award since the union admitted that it had not done so. The union defended its failure and refusal to comply by reiterating an argument previously made in an exception that was considered and denied by the Authority. A party to an arbitrator's award must implement such an award, when timely filed exceptions to the award have been denied by the Authority. The failure or refusal by a party to implement such an award constitutes a violation of § 7116(a)(1) and (8) or § 7116(b)(1) and (8). The Authority ordered that the union fully comply with the award which included requirements that the union purchase newspaper advertisements and contact local television stations with a request that they announce that the union's previously broadcast accusations were erroneous.

Calhoun Dissent. Chairman Calhoun concurred in the Authority's conclusion that the union failed to comply with the arbitration award and therefore violated § 7116(b)(8). However, Chairman Calhoun dissented from the Order of this decision stating: "I do not believe that the policies and purposes of the Statute will be effectuated at this time by ordering the [union] to purchase ads in local newspapers . . . or contact the local television stations for the purpose of having them announce that previously broadcast accusations of the union were erroneous . . . While the publication and broadcast remedy may well be proper in other cases, the extraordinary nature of that remedy coupled with the passage of time leads me to conclude that it is inappropriate here."

23 FLRA No. 78

Federal Labor Relations Authority

DOJ, U.S. Marshals Service
and Int'l Council of U.S.
Marshals Service Locals,
AFGE (Hewitt, Arbitrator),
Case No. 0-AR-977 (Decided
October 7, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration	7116(d)
Election of Remedy	7121(d)
Grievance Barred	7122(a)
Matter Raised Under EEO Procedures	
"Matter" Within the Meaning of § 7121(d)	
"Prohibited Personnel Practice"	
Exceptions Asserted in Appeal	
Award Contrary to § 7121(d)	
5 U.S.C. § 2302(a)(2)(A)(iii) and 2302(b)(1)	
29 U.S.C. § 631 and 633a	
42 U.S.C. § 2000e-16	

DIGEST NOTES

The grievance concerned the suspension of the grievant for malicious false statements and for an unexcused absence. The activity proposed a 5-day suspension. Subsequently, the grievant amended a previously filed ULP charge to claim that the activity was threatening him with disciplinary action as a reprisal against him for protected activity. He then filed a formal complaint under statutory EEO procedures alleging he had been discriminated against because of his race and age and demanding that he not be suspended as proposed. Several months later, the activity issued a final decision suspending the grievant for 5 days. The grievant then filed a grievance which was submitted to arbitration protesting the suspension as discriminatory and not for just cause. Before the arbitrator, the activity argued that the grievance was barred, under § 7121(d), by the earlier-filed EEO complaint and under § 7116(d) by the earlier-filed amended ULP charge. The arbitrator acknowledged that the EEO complaint was the employee's option because it was filed before the grievance and expressly concerned the suspension action. He however found that the grievant had exercised his option under § 7121(d) only as to the issue of discrimination. He ruled that the issue of whether the suspension was for just cause had not been raised elsewhere and therefore was not precluded by § 7121(d) or § 7116(d). On that issue he sustained only the unexcused absence charge and reduced the suspension to 1 day.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES

In its exception the agency contended that the award was contrary to § 7121(d). The agency argued that the grievance was barred by the earlier filed EEO complaint and that the matter the grievant elected to raise under the statutory procedure was the matter of his suspension allegedly because of his race and age, a prohibited personnel practice under 5 U.S.C. § 2302(b)(1). The Authority held that there was an election by the grievant to raise the matter under the statutory EEO procedures, therefore, the matter was prohibited from being relitigated under the negotiated grievance procedure. Section § 7121(d) provides that when an employee affected by a prohibited personnel practice under § 2302(b)(1) has timely raised the matter under an applicable statutory procedure, the matter subsequently may not be raised as a grievance. The Authority has identified two conditions of § 7121(d) which must be met in order for a grievance to be precluded: 1) The matter which is the subject of the grievance is the same matter initiated under the statutory procedure; and 2) the matter was earlier raised by the employee timely initiating an action under the statutory procedure. Both conditions were met in this case. The term "matter" as used in § 7121(d) refers not to the issue or claim of prohibited discrimination, but rather, to the suspension action. The Authority found that the matter raised both by the grievance and the formal complaint of discrimination was the suspension, either proposed or final, of the grievant.

The term "matter" described in § 7121(d) pertains to prohibited personnel practices under § 2302(b)(1). In turn, § 2302(b) describes prohibited personnel practices in terms of "any personnel action" with "personnel action" defined in § 2302(a)(2)(A)(iii) to include a suspension for 14 days or less. Section 2302(b)(1) prohibits any employee who has authority to take, direct others to take, recommend, or approve any personnel action from discriminating with respect to such personnel action authority. Thus a personnel action is central to the prohibited practice of § 2302(b)(1) and specifically encompasses recommended and approved personnel actions.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HAWAII FEDERAL EMPLOYEES METAL
TRADES COUNCIL, AFL-CIO

Union

and

Case No. 0-NG-1303

PEARL HARBOR NAVAL SHIPYARD

Agency

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute and section 2424.1 of the Authority's Rules and Regulations on a petition for review of negotiability issues filed by the Union. For the reasons indicated below, it has been determined that the Union's petition for review was untimely filed and must be dismissed on that basis.

Under section 7117(c)(2) of the Statute and section 2424.3 of the Authority's Rules and Regulations, the time limit for filing a petition for review of negotiability issues is 15 days after service on the Union of the Agency's allegation that the duty to bargain in good faith does not extend to the matter proposed to be bargained. Further, under section 2429.23(d) of the Authority's rules of procedure, the time limit established in section 7117(c)(2) of the Statute may not be extended or waived by the Authority.

The documents the Union submitted with its petition for review indicate the Agency's allegation that the proposal in question is nonnegotiable is dated July 7, 1986. A notation on the Agency's allegation shows that it was served on the Union by hand delivery on July 8, 1986, which is also the date of receipt indicated by the Union's date stamp affixed to the allegation. Therefore, under section 2424.3 of the Authority's Rules and Regulations as well as section 2429.21 which also is applicable to computation of the time limit here involved, the petition for review had to be filed, that is, received in the national office of the Authority, not later than the close of business on July 23, 1986.*/ However, the petition was not filed with the Authority at its national office in Washington, D.C., until July 25, 1986.

Accordingly, as the Union's petition for review was untimely filed, and apart from other considerations, it is hereby dismissed.

For the Authority.

Issued, Washington, D.C., September 30, 1986.

Harold D. Kessler
Harold D. Kessler
Director of Case Management

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*/Consistent with section 2429.22 of the Authority's rules of procedure, five days is added to the filing period only when "the notice or paper (*i.e.*, the Agency's allegation of non-negotiability) is served ... by mail."

23 FLRA No. 73

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R3-84, SEIU,
AFL-CIO

Union

and

Case No. 0-NG-1237

DISTRICT OF COLUMBIA
AIR NATIONAL GUARD

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

The petition for review in this case comes before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). It raises issues concerning the negotiability of a single Union Proposal.

II. Union Proposal

> ARTICLE V
> UNION RIGHTS
>
> Section 4. In order not to breach the statutory duty of Fair representation to all bargaining unit employees without regard to union membership the parties agree to the following:
>
> A. Officers and Stewards will not be required to wear the military uniform while:
>
> 1. Performing representational duties.

2. Representing the Union in a third party proceeding.
3. Serving as a member of the Union's negotiating team.
4. Appearing as a witness in any third party proceeding.
5. Representing the Union on a committee established by the Employer.
6. Attending a labor/management training session.

B. Employees in the bargaining unit will not be required to wear the military uniform while:

1. Processing a personnel grievance under the negotiated grievance procedure.
2. Appearing as a grievant or witness before a third party proceeding.
3. Appearing as an observer at contract negotiations.
4. Attending a labor/management session.

C. Reasonable time will be allowed officers, stewards and employees to change in and out of the military uniform under the circumstances stated in subsection (A-B) of this Article.

A. Positions of the Parties

The Agency argues that the proposal is outside the duty to bargain because (1) the Union has waived its right to bargain on the proposal; (2) the proposal is inconsistent with 32 U.S.C. § 709; (3) the proposal is inconsistent with the Agency's right to determine the "methods and means" of performing its work under section 7106(b)(1) of the Statute, as such right was explained in Division of Military and Naval Affairs, State of New York, Albany, New York and New York Council, Association of Civilian Technicians, 15 FLRA 288 (1984), aff'd New York Council, Association of Civilian Technicians v. FLRA, 757 F.2d 502 (2d Cir. 1985), cert. denied 106 S.Ct. 137 (1985); and (4) the proposal is not an "appropriate arrangement" under section 7106(b)(3) of the Statute. The Union disputes the Agency's arguments and asserts that the proposal is within the Agency's duty to bargain.

B. Analysis and Conclusions

1. Did the Union waive its right to bargain?

The Agency asserts that the Union waived its right to negotiate this proposal when the Union agreed to allow the Agency to end a practice established under an expired collective bargaining agreement. Under that practice technicians were allowed to wear civilian attire when they were performing their technician duties. The issue raised by the Agency's contention is essentially one of contractual interpretation. To the extent the parties are in dispute as to the intended application of their agreement regarding the wearing of the military uniform, that dispute should be resolved through other appropriate procedures. The existence of that dispute does not preclude us from, nor require us to delay, deciding whether the Union's proposal is nonnegotiable under the Statute. See American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 (1984).

2. Does the proposal conflict with the Agency's rights under section 7106(b)(1)?

The Agency asserts that the proposal is inconsistent with its rights under section 7106(b)(1) of the Statute as explained by the Authority in Division of Military and Naval Affairs. We conclude that the proposal does not conflict with the Agency's rights under section 7106(b)(1). Our reasons, which are interrelated and discussed fully below, are these: first, the labor-management activities covered by the proposal do not concern the performance of the Agency's work within the meaning of section 7106(b)(1) of the Statute; second, the Agency's purpose in imposing the uniform requirement would not be furthered by applying the requirement to technicians when they are involved in labor-management activities.

In Division of Military and Naval Affairs, supra, 15 FLRA 288, the Authority held that decisions on whether National Guard technicians must wear military attire while performing technicians' duties were negotiable only at the election of the Agency because these decisions concerned the right to determine the "methods and means" of performing work under section 7106(b)(1) of the Statute. The Authority reached that conclusion, as explained in the decision, in view of the unique status National Guard technicians have as compared to other Federal civilian employees. As a result of their essential role in achieving mobilization of the part-time Guard into a military force and their functions in performing technician duties, they must possess a highly developed sense of esprit de corps and military discipline which the Authority found was furthered by the wearing of military attire. This reasoning does not apply to the proposal here.

The proposal's exceptions to the Agency's uniform requirement concern labor-management activities--the joint efforts of employees, the Union, and the Agency's management officials in setting and administering technicians' conditions of employment. These activities do not constitute employee performance of technician duties. They are not the Agency's "work." National Federation of Federal Employees, Local 541 and Veterans Administration Hospital, Long Beach, California, 12 FLRA 270, 274 (1983); American Federation of Government Employees, AFL-CIO, Local 2761 and U.S. Department of the Army, U.S. Army Adjutant General Publication Center, St. Louis, Missouri, 14 FLRA 438, 440-41 (1984). When acting as union representatives employees are serving in a different capacity than when they are performing the duties of their positions. The Statute protects the rights of employees to serve as union representatives in order to promote the public interest in collective bargaining. To achieve that objective, the Statute frees employees functioning as union representatives from many of the constraints to which they would otherwise be subject as employees so as to enable them to represent the interests of the bargaining unit. See, for example, United States Air Force, Davis-Monthan Air Force Base, Tucson, Arizona and American Federation of Government Employees, Local 2924, AFL-CIO, 20 FLRA No. 84 (1985).

Indeed, that difference is incorporated in the Agency's own regulations. Technician Personnel Regulation, Section 302.7. That section provides that it is "inappropriate" for a unit employee to wear the military uniform when negotiating a collective bargaining agreement. Like the negotiation of a collective bargaining agreement, the other labor-management activities encompassed by the Union's proposal are different from regular technician duties. Our rationale for finding that the requirement that National Guard technicians wear the military uniform while performing technician duties constituted a "method or means" of performing work, as stated in

Division of Military and Naval Affairs, does not apply here. The Union's proposal, therefore, does not conflict with the Agency's right to determine the methods and means of performing its work under section 7106(b)(1) of the Statute. *See also 152nd Tactical Fighter Group, Arizona Air National Guard, Tucson, Arizona*, 21 FLRA No. 90 (1986) (technicians participating in Authority proceedings on official time as requested by the Authority's General Counsel cannot be required to wear the military uniform in these proceedings).

Subsection C complements subsections A and B by providing that technicians will have time to change their attire when they shift between technicians' duties and labor-management activity. This part of the proposal is similar to those proposals which provide official time for union representatives to prepare for labor-management relations activities. *See*, *for example*, *Association of Civilian Technicians, Granite State Chapter and The Adjutant General, State of New Hampshire*, 7 FLRA 241 (1981). For the reasons set forth in that decision, we find that subsection C is negotiable.

3. *Does the proposal conflict with 32 U.S.C. § 709?*

The Agency asserts that 32 U.S.C. § 709 mandates that technicians must maintain military status in the National Guard to retain employment in technician positions. It argues that the proposal treats technicians as civilian employees so as to contradict this requirement.

As detailed in Part 2, the Union's proposal does not concern the performance of technician duties and does not in any way affect unit employees' military status. Accordingly, the Agency's argument concerning this statutory provision is misplaced.

4. *Is the proposal an "appropriate arrangement" under section 7106(b)(3) of the Statute?*

The Agency's arguments concerning whether the proposal amounts to an appropriate arrangement under section 7106(b)(3) are premised on its view that the proposal conflicts with its rights under section 7106(b)(1). *See National Association of Government Employees, Local R14-87 and Kansas Army National Guard*, 21 FLRA No. 4 (1986). Since we have decided that the proposal does not conflict with the Agency's rights under section 7106(b)(1), we need not address whether the proposal is negotiable as an appropriate arrangement under section 7106(b)(3) of the Statute.

III. Order

Pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request, or as otherwise agreed to by the parties, bargain concerning the Union proposal.*/

Issued, Washington, D.C. September 30, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In finding the Union's proposal to be negotiable, the Authority expresses no opinion on the merits of that proposal.

23 FLRA No. 74

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, SEIU, AFL-CIO

Union

and

Case No. O-NG-1142

VETERANS ADMINISTRATION
MEDICAL CENTER
BROCKTON/WEST ROXBURY, MA

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

The Union filed a petition for review under 5 U.S.C § 7105(a)(2)(E) challenging the Agency's allegation that the following proposal was not negotiable:

> The V.A. shall allow sufficient time in the regular work week for the elected Secretary [of the local Union] to perform (his/her) duties as required to expedite all matters of a Grievable nature.

II. Positions of the Parties

The Agency argues that the proposal violates 5 U.S.C. § 7131(b) by requiring official time for internal union business. It also asserts that the proposal violates its right to assign work under 5 U.S.C. § 7106(a)(2)(B). The Union counters that the Agency has not demonstrated a "compelling need" as required by 5 C.F.R. § 2424.11.[1]

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[1] In its allegation of nonnegotiability the Agency used the term, "compelling reason," when conveying its view that

(Continued)

III. Analysis and Conclusions

In disagreement with the Agency, we find the proposal negotiable and within the duty to bargain under 5 U.S.C. § 7131(d).

A. The Proposal Does Not Concern Internal Union Business

With certain limitations, an agency and a union must negotiate on the amount of official time available for an employee representing that union. 5 U.S.C. § 7131(d). One of the limitations is the prohibition in 5 U.S.C. § 7131(b) against conducting internal union business on official time. The definition of internal union business is narrowly drawn, however, and relates to the institutional structure of the union. *American Federation of Government Employees, AFL-CIO, Local 2823 and Veterans Administration Regional Office, Cleveland, Ohio*, 2 FLRA 4 (1979).

Activities involving labor-management contacts, as well as preparation for them, are not internal union business. For this reason, official time for union representatives to engage in contract negotiations--over and above the official time to which they are otherwise entitled for that purpose under 5 U.S.C. § 7131(a)--and to prepare for such negotiations is negotiable under 5 U.S.C. § 7131(d). *See American Federation of Government Employees, AFL-CIO and U.S. Environmental Protection Agency*, 15 FLRA 461, 462-63 (1984). *See also American Federation of Government Employees, AFL-CIO, Local 1692 and Headquarters, 323rd Flying Training Wing (ATC), Mather Air Force Base, California*, 3 FLRA 305, 309 (1980). We did not address what

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(Continued)

the proposal was in conflict with 5 U.S.C. § 7131(b). The Union misconstrued this as a "compelling need" argument and argued that the Agency had not met the compelling need criteria in 5 C.F.R. § 2424.11 to exclude its proposal from bargaining.

We find no indication in the record that by use of the term "compelling reason," the Agency intended to advance a compelling need argument to support its allegation of nonnegotiability. For this reason, we will not address this issue further.

constituted "preparation" for labor-management contacts in that case, but held this would be more appropriately resolved by the parties during negotiations or by an arbitrator in the context of a specific case. We expressly excluded from the definition of "preparations" matters which involved the internal business of the union.

The Union's proposal specifically addresses official time for the activities of its Secretary so as to enable her to expedite all grievable matters. Participation in grievance proceedings and preparation for them do not relate to the institutional structure of the Union. They are at the heart of the representational activities for which official time may be negotiated under 5 U.S.C. § 7131(d).

The Agency asserts that the Union Secretary is working and will continue to work on internal union business rather than the grievable matters proposed. The Agency points to an unfair labor practice charge which was filed by the Union within a few weeks of the negotiability petition and which summarizes the Secretary's duties:

> She is also a part time Steward on occasion. She does filing, types grievances and other office duties.

The Union asserts that the Secretary handles grievances during her duty hours resulting in their earlier resolution.

The Agency's argument anticipates that the Secretary will use negotiated official time for internal union business. An agency cannot remove a negotiable item--one that is consistent with applicable law and regulation--from the bargaining table because it expects it to be abused. Other proceedings--such as a disciplinary action, an unfair labor practice proceeding, or a grievance--are available to remedy such abuse if it occurs. See, for example, American Federation of Government Employees, Local 1778, AFL-CIO, 10 FLRA 346, 350-351 (1982); Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, Local 3231, 11 FLRA 7 (1983). We appreciate the Agency's concern with the difficulty in particular situations of distinguishing between the Secretary's representational activities and internal union business. However, as we said in Mather, these distinctions are best drawn at the bargaining table or through arbitration.

The purpose of this negotiability proceeding is to decide if the Union's proposal is inconsistent with applicable law and regulation and therefore outside the duty to bargain. 5 U.S.C. § 7117(c). The proposal concerns official time for the Union's Secretary to work on grievances. Since partici- pation in and preparation for grievance proceedings are not internal union business, bargaining on this proposal is not precluded by the prohibition against conducting internal union business on official time.

B. The Proposal Does Not Interfere With Management's Right To Assign Work

In support of its assertion that the proposal is nonnegotiable, the Agency adverts to the proposal's effect on management's right to assign work under 5 U.S.C. § 7106(a)(2)(B). The Agency here states only the obvious. If the Secretary performs representational activities on official time, the Agency is prevented from assigning work to that employee during that time. The Agency's reliance on American Federation of Government Employees, AFL-CIO, International Council of U.S. Marshals Service Locals and Department of Justice, U.S. Marshals Service, 4 FLRA 384 (1980) is misplaced. In that case, the union proposal addressed the time an employee would qualify with weapons on a firing range and would practice to maintain qualifications. The proposal would have required the agency to assign certain types of work to certain employees to the exclusion of other responsibilities. We held that the proposal was not negotiable under 5 U.S.C. § 7106(a)(2)(B) because it violated management's right to assign work.

The Marshals Service case is not on point. While authorizing official time for representational purposes necessarily affects management's ability to assign work, there is nothing in the Union's proposal that would permit the Union's Secretary to use the official time authorized by the proposal so as to disregard the needs of the Agency to assign work to her at particular times. That is, the proposal would not prevent the Agency from making whatever accommodations may be necessary between the scheduling of work assignments and the scheduling of official time. See National Federation of Federal Employees, Local 541 and Veterans Administration Hospital, Long Beach, California, 12 FLRA 270, 273-75 (1983).

IV. Order

The Agency must, upon request (or as otherwise agreed to by the parties), bargain concerning the Union's proposal.[2]

Issued, Washington, D.C., September 30, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[2] In deciding that the proposal is within the duty to bargain, we make no judgment on its merits.

23 FLRA No. 75

(23 FLRA No. 75)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R14-77

Union

and

Case No. 0-NG-1204

VETERANS ADMINISTRATION
MEDICAL CENTER, GRAND JUNCTION, CO

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Labor-Management Relations Statute (the Statute) and concerns the negotiability of the following Union proposal:

> Article X, Section 9 (b)
>
> The Union President will be granted two (2) specifically scheduled hours in the Union office per week and the Chief Steward will be granted three (3) specifically scheduled hours in the Union office per week. It is agreed that only representational duties will be performed during these scheduled times. The scheduled times will be worked out between the parties after the completion of this Supplemental Agreement.

We hold that the proposal is within the statutory duty to bargain.

II. Positions of the Parties

The Agency contends the proposal is nonnegotiable because it violates sections 7106(a)(2)(B) and 7131(d) of the Statute; the governing master agreement; and, finally, because it pertains to an employee who is not covered by the master agreement.

The Union argues that the proposal is negotiable since it is consistent with the terms of the governing master agreement and because it pertains only to bargaining unit employees. The Union also argues that the proposal would not prevent the Agency from assigning work under section 7106(a)(2)(B) of the Statute.

III. Analysis

A. Management's right to "assign work" is not a bar to negotiability.

The proposal provides for specifically scheduled hours in the Union office on a weekly basis for the Union President and the Chief Steward. The parties are to "work out" these scheduled times in the future.

The Agency has the burden of demonstrating that granting official time will interfere with the accomplishment of its assigned work. *Overseas Federation of Teachers and Department of Defense Dependent Schools, Mediterranean Region, APO New York*, 21 FLRA No. 81 (1986); *Department of the Air Force, Scott Air Force Base, Illinois*, 20 FLRA No. 89 (1985), *petition for review filed sub nom. National Association of Government Employees, Local R7-23 v. FLRA*, No. 86-1011 (D.C. Cir. January 7, 1986). In this case the Agency contends that the proposal removes its discretion to assign work under section 7106(a)(2)(B) since the proposal requires "specifically scheduled hours" to perform representational duties. The Agency relies on *National Treasury Employees Union and NTEU Chapter 80 and Department of the Treasury, Internal Revenue Service, Central Region*, 8 FLRA 197 (1982); *American Federation of Government Employees, Local 2094, AFL-CIO and Veterans Administration Medical Center, New York, New York*, 19 FLRA No. 120 (1985). In each of these cases the Authority found proposals nonnegotiable that specifically allocated to bargaining unit employees fifteen minute periods at the beginning and end of each workday to perform particular functions--packing/unpacking files, reaching duty stations, performing personal hygiene and changing clothes--not associated with the work normally performed by those employees. The Authority held that each of those proposals removed management's discretion to assign work under section 7106(a)(2)(B) of the Statute.

Even apart from the consideration that this proposal is concerned with representational activities, which are statutorily sanctioned as discussed in B, below, the proposal here is substantially different from those in Internal Revenue Service and Veterans Administration Medical Center, and warrants an opposite conclusion. While the proposal calls for the Union's President and Chief Steward to be granted specifically scheduled hours in the Union office, it also provides that the parties will work out scheduled times in the future. Thus, the proposal does not itself schedule which hours the Union President and Chief Steward will spend in the Union office. Rather, the proposal allows the parties to make adjustments as necessary. The Agency's claim is merely speculative; it has failed to show that the use of official time under the proposal will interfere with the assignment or accomplishment of its work.

B. The proposal is consistent with section 7131(d) of the Statute.

Section 7131(d) authorizes the negotiation of official time for labor-management related representational matters such as contract administration, participation in grievance arbitration and the like. Veterans Administration Medical Center, 19 FLRA No. 120, slip op. at 3. The disputed proposal specifically provides that "only representational duties" will be performed during the times scheduled in the Union office. As such, the proposal is clearly consistent with the requirements of section 7131(d) of the Statute.

Despite the express language of the proposal, the Agency argues that the Union President and Chief Steward will use negotiated official time to conduct internal union business prohibited by section 7131(b) of the Statute. See American Federation of Government Employees, AFL-CIO, Local 2823 and Veterans Administration Regional Office, Cleveland, Ohio, 2 FLRA 4 (1979). An agency cannot remove an otherwise negotiable proposal from the bargaining table simply because the agency expects that, if agreed upon, the proposal would provide the opportunity for some abuse. Such speculation provides no basis for finding a proposal nonnegotiable. We decide here only the negotiability issues presented under section 7105(a) (2)(E) of the Statute concerning whether the proposal is consistent with applicable law and regulation and, therefore, within the duty to bargain.

C. The parties' master agreements do not require a finding of nonnegotiability.

1. Background

This appeal arose from negotiations for a supplemental agreement to a master agreement covering nonprofessional and

GS professional employees (Agreement 1). NAGE and the Veterans Administration are also parties to a master agreement covering registered nurses (Agreement 2). The Agency argues that this appeal is inappropriate because it violates Article 6, Section 14 of Agreement 1. Further, the Agency contends that the proposal is nonnegotiable because it applies to an employee not covered by Agreement 1.

2. Claimed violation of Agreement 1.

The Agency's claim that the proposal is not appropriate for inclusion in a local supplemental agreement under the Agency's interpretation of the provisions of Master Agreement 1 does not raise negotiability issues under section 7117 of the Statute. Rather, it raises a question for resolution through whatever procedures Agreement 1 establishes for contract interpretation disputes. National Treasury Employees Union, Chapter 153 and Department of the Treasury, U.S. Customs Service, Region II, 21 FLRA No. 102, slip op. at 6 (1986).

3. Claim that proposal applies to an employee not covered by Agreement 1.

The Agency argues the proposal is nonnegotiable since it arose from negotiations supplemental to Agreement 1, but the Union President to whom it applies is a registered nurse subject to the terms of Agreement 2. This argument is without merit. Under section 7131(d) of the Statute a Union representative is entitled to official time to represent fellow bargaining unit employees in an amount the parties agree to be reasonable, necessary and in the public interest. See, for example, American Federation of Government Employees, Local 1698 and Department of the Navy, Aviation Supply Office Consolidated Civilian Personnel Division, 17 FLRA 557, 559 (1985). Although not himself covered by Agreement 1, the Union President is a member of a bargaining unit to which Agreement 1 and the disputed proposal would apply. Thus, the proposal is negotiable insofar as it grants the Union President and Chief Steward official time to perform representational duties on behalf of other members of the bargaining unit of which they are members. Compare American Federation of Government Employees, AFL-CIO, Local 2225 and U.S. Department of Defense, Naval Air Rework Facility, Norfolk, Virginia, 19 FLRA No. 22 (1985).

IV. Conclusions

For the reasons stated above, the Authority concludes that the proposal is consistent with management's right to assign work and the requirements of section 7131(d) of the Statute. The claim that the proposal is barred by Agreement 1 does not state a ground pertaining to the negotiability of the proposal under the Statute. Finally, the proposal only concerns conditions of employment of bargaining unit employees.

V. Order

Pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall, upon request, or as otherwise agreed to by the parties, bargain concerning the Union's proposal.*/

Issued, Washington, D.C., September 30, 1986.

L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In deciding that the proposal is within the duty to bargain we make no judgment on its merits.

23 FLRA No. 76

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, HUD COUNCIL 222

Union

and

Case No. O-NG-887

DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of two proposals concerning the establishment of competitive areas for reduction-in-force (RIF) purposes. For the reasons set forth below, we conclude that both proposals are nonnegotiable.

II. Threshold Issue

The Agency contends that the Union's appeal is not properly before the Authority for review under section 2424.3 of the Authority's Rules and Regulations because the issues involved in this appeal "apparently had been settled at the bargaining table and a full agreement had been reached." The Agency asserts that the parties had concluded binding arbitration to resolve certain impassed bargaining issues without the Union's having requested a written allegation of nonnegotiability from the Agency concerning the two disputed proposals, and that the Union's negotiability appeal filed six weeks after bargaining had concluded should not be permitted.

We conclude that the Agency's contention must be rejected. The record discloses that the Union requested a written determination of nonnegotiability from the Agency concerning the two disputed proposals on July 15, 1983, which was after the parties had completed an impasse arbitration proceeding but before they executed their collective bargaining agreement on September 7, 1983. Having received no response to its request for a written determination, the Union, on August 8, 1983, filed its petition for review pursuant to section 2424.3 of the Authority's Rules and Regulations. On August 12, 1983, the Agency served its written determination of nonnegotiability on the Union. Since the Agency provides no support for its contention that the parties had reached agreement on the two proposals at issue in this case and since the Union's petition for review was otherwise timely filed with the Authority, we conclude that the appeal is properly before us for review.

III. The Union's Proposals

Competitive Areas Proposal 1

> The competitive areas for reductions in force shall be determined by negotiation on a case-by-case basis according to management needs.

Competitive Areas Proposal 2

> Headquarters. The competitive area for Headquarters is the commuting area, headquarters wide.

IV. Positions of the Parties

The Agency contends that the two proposals in dispute are indistinguishable and should be decided as if they were one proposal. In each instance, the Agency asserts that there is no duty to bargain concerning a proposed competitive area for RIF purposes which includes non-unit employees and that a competitive area consisting only of bargaining unit employees would be inconsistent with the requirements of 5 CFR § 351.402(b), a Government-wide regulation.

The Union contends that Proposal 1 would not require the Agency to establish any particular competitive area or require a RIF to be confined to any organizational entity, and that OPM "standards" are within an agency's discretion in certain respects. The Union asserts that the application of Proposal 2 in a RIF would have an effect mainly on unit employees and that the proposal's indirect effect on non-unit employees does not render it outside the duty to bargain.

V. Analysis and Conclusions

We conclude that both proposals concerning the definition of competitive areas are nonnegotiable. In our Decision and Order on Remand in American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 22 FLRA No. 49, slip opinion at 6-7 (1986), appeal filed, No. 86-1447 (D.C. Cir. Aug. 11, 1986),[1] we determined, in circumstances where OPM regulations setting forth the criteria for defining competitive areas were applicable, that as a practical matter most competitive areas sought to be bargained would of necessity contain non-unit employees.[2] In that case we concluded that as proposals seeking to define competitive areas would thereby directly determine the working conditions of non-unit employees, such proposals would be outside the duty to bargain. In this case, the Agency has alleged--without contradiction by the Union--that both proposals in dispute would, because of the application of the OPM regulations, directly affect the working conditions of non-unit employees. Accordingly, consistent with our Decision and Order on Remand in Office of Personnel Management, we hold that both proposals are outside the duty to bargain.[3]

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[1] In Local 32, American Federation of Government Employees v. FLRA, 774 F.2d 498 (D.C. Cir. 1985), the D.C. Circuit had remanded the Authority's prior decision in that case, 14 FLRA 754 (1984), for further consideration.

[2] See 5 CFR 351.402(b), 51 Fed. Reg. 318 at 321 (1986).

[3] Additionally, to the extent that the term "management needs" in Proposal 1 would not include the Agency's need to comply with the requirements of applicable OPM regulations in the establishment of competitive areas, it would be nonnegotiable for that reason as well.

VI. Order

Pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., September 30, 1986.

L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

23 FLRA No. 77

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3511, AFL-CIO

Respondent

and

Case No. 6-CO-50043

VETERANS ADMINISTRATION
AUDIE L. MURPHY MEMORIAL VETERANS
HOSPITAL, SAN ANTONIO, TEXAS

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority, in accordance with section 2429.1(a) of the Authority's Rules and Regulations, based on a stipulation of facts by the parties, who have agreed that no material issue of fact exists. The General Counsel filed a brief for the Authority's consideration.

The complaint alleges that the Respondent Union violated section 7116(b)(1), (5) and (8) of the Statute by failing and refusing to comply with the provisions of section 7122 of the Statute by refusing to fully comply with an arbitrator's award to which exceptions were filed and which had been subsequently denied by the Authority.

II. The Facts

The Veterans Administration and the American Federation of Government Employees, AFL-CIO have been parties to a master agreement covering a nationwide consolidated unit, including employees of the Audie L. Murphy Memorial Veterans Hospital, San Antonio, Texas (Activity). The Activity has recognized the Respondent Union as the local representative of AFGE for the purposes of collective bargaining and representation of a unit of Activity employees.

On October 5, 1983, the Activity filed a grievance alleging that the Respondent Union had violated Articles 6 and 24 of the master agreement by, among other things, issuing a news release which made libelous and defamatory attacks upon management and employees of the facility concerning the disposal of certain material. On June 25, 1984, Arbitrator Harry L. Johnson issued an award finding that the Union had violated the agreement as alleged and sustaining the Activity's grievance. As a remedy, the Arbitrator directed the Union to take the following actions:

> 1. Purchase a one-half page ad in all San Antonio daily newspapers stating clearly and without ambiguity, a) that what was found in the autopsy room did not contain any human tissue; b) that the action taken by the officials of AFGE was in violation of the VA/AFGE Master Agreement; and c) that in the future, the terms/conditions of the contract will be followed.
>
> 2. Write a letter addressed to all employees retracting all allegations in this case and post the letter with a copy of the advertisement on both bulletin boards used by AFGE for a period of sixty (60) days.
>
> 3. Write a letter to Management committing President Garcia and Vice President Fenstermacher and Local 3511 to the provisions of the VA/AFGE Master Agreement with the assurance that, in the future, all matters that concern the Local will be brought to the attention of Management in accordance with the Master Agreement.
>
> 4. Forward a copy of the letters in 2 & 3 along with a copy of the paid advertisement to Television Stations Channels 4, 5, and 12, requesting them to announce that Union's charges which they broadcast were erroneous.
>
> 5. Complete the above tasks on or before July 16, 1984, at 4:30 p.m. with copies to Management.

The Respondent Union filed timely exceptions to the arbitrator's award with the Authority alleging that the award was contrary to law, including the Constitution of the United States, and the master agreement. The Activity filed an opposition, contending that the Union's arguments constituted nothing more than disagreement with the Arbitrator's findings of fact and his interpretation and application of the agreement. The Authority found, after careful consideration of the record, including the submissions of the parties, that the Union had failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute. Accordingly, the Authority denied the Union's exceptions. Audie L. Murphy Memorial Veterans Hospital, Veterans Administration, San Antonio, Texas and American Federation of Government Employees, Local 3511, San Antonio, Texas, Case No. 0-AR-812, issued April 23, 1985.

On June 17, 1985, the Activity requested the Respondent Union to comply with the arbitrator's award by July 19, 1985. The Union's President and Vice President advised the Activity that the Union would not comply with that portion of the award which required the Union to purchase ads in the daily papers and to contact the local television news media. The Union asserted that the arbitrator's award violated its constitutional rights. The Union has failed and refused and continues to fail and refuse to comply with the arbitrator's award.

III. Positions of the Parties

The General Counsel's position is that the Respondent Union's refusal to implement the arbitration award is violative of section 7116(b)(1), (5) and (8) of the Statute. The General Counsel asserts that the Respondent Union presented the same arguments regarding the unconstitutionality of the arbitration award to the Authority in its exceptions to the award. The Authority considered the Union's exceptions and rejected them. Since the Union's exceptions to the arbitration award were denied by the Authority, the award is final and binding and the Union is required to implement the award pursuant to section 7122 of the Statute. Thus, the Union's refusal to do so is violative of the Statute.

Neither the Union nor the Activity filed briefs or arguments in the case.

IV. Analysis

In this case, there is no question as to whether the Respondent Union has complied with the arbitrator's award. The Respondent Union admits that it has not done so. The Union defends its failure and refusal to comply with the award by reiterating an argument previously made in an exception that was considered and denied by the Authority.

It is well established that a party to an arbitrator's award must implement such an award, when timely filed exceptions to the award have been denied by the Authority, and that the failure or refusal by a party to implement such an award constitutes a violation of section 7116(a)(1) and (8) of the Statute. See Department of the Treasury, United States Customs Service, New York Region, New York, New York, 21 FLRA No. 119 (1986); U.S. Department of Justice and Department of Justice, Bureau of Prisons (Washington, D.C.) and Federal Correctional Institution (Danbury, Connecticut), 20 FLRA No. 5 (1985), enforced sub nom. U.S. Department of Justice and Department of Justice, Bureau of Prisons v. FLRA, 792 F.2d 25 (2d Cir. 1986); General Services Administration, Washington, D.C., 18 FLRA No. 52 (1985); United States Marshals Service, 13 FLRA 351 (1983), enforced sub nom. United States Marshals Service v. FLRA, 778 F.2d 1432 (9th Cir. 1985).

Based on the foregoing precedent, the Authority finds that the Respondent Union was required to implement the arbitration award which became final and binding within the meaning of section 7122(b) of the Statute upon the Authority's denial of the Respondent Union's exceptions.

V. Conclusion

The Authority has considered all the facts and circumstances of this case, including the positions of the parties. The Authority concludes that the Respondent Union violated section 7116(b)(8) of the Statute by failing and refusing to comply with the requirements of section 7122 of the Statute by refusing to fully implement the arbitration award of Arbitrator Harry L. Johnson rendered on June 25, 1984, when its exceptions to the arbitrator's award had been denied by the Authority. In the circumstances of this case, the Authority finds it unnecessary to pass upon whether such conduct was also violative of section 7116(b)(1) and (5) of the Statute.

ORDER*/

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is ordered that the American Federation of Government Employees, Local 3511, AFL-CIO, shall:

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*/ Chairman Calhoun dissents from the Order in this decision.

1. Cease and desist from:

(a) Failing and refusing to fully implement the June 25, 1984 arbitration award of Arbitrator Harry L. Johnson rendered in Audie L. Murphy Memorial Veterans Hospital, Veterans Administration, San Antonio, Texas and American Federation of Government Employees, Local 3511, San Antonio Texas, Arbitration File No. 84K/02774.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Fully comply with the June 25, 1984 award of Arbitrator Harry L. Johnson, including purchasing the required one-half page ad in all San Antonio daily newspapers and contacting the local television stations as directed requesting that they announce that the previously broadcast accusations of the Union were erroneous.

(b) Post at its business offices and its normal meeting places, including all places where notices to members and employees of the Veterans Administration, Audie L. Murphy Memorial Veterans Hospital are customarily posted, copies of the attached Notice, on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the President of the American Federation of Government Employees, Local 3511, AFL-CIO, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to members and other employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Submit appropriate signed copies of such Notices to the Director, Audie L. Murphy Memorial Veterans Hospital, Veterans Administration, for posting in conspicuous places where notices to unit employees are customarily posted, where they shall be maintained for a period of 60 consecutive days from the date of posting.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VI, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., September 30, 1986.

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

Dissent of Chairman Calhoun

I agree that Respondent's refusal to comply with the arbitration award in this case violates section 7116(b)(8) of the Statute. However, contrary to my colleagues, I do not believe that the policies and purposes of the Statute will be effectuated at this time by ordering the Respondent to purchase ads in local newspapers in the San Antonio area or contact the local television stations for the purpose of having them announce that previously broadcast accusations of the Union were erroneous. Indeed, I believe that compliance with the order may well exacerbate rather than remedy the problem. Nearly three years have passed since the underlying grievance in this case was filed and undoubtedly the incident has long since passed from the public consciousness. While the publication and broadcast remedy may well be proper in other cases, the extraordinary nature of that remedy coupled with the passage of time leads me to conclude that it is inappropriate here.

Issued, Washington, D.C., September 30, 1986.

Jerry L. Calhoun, Chairman
FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL MEMBERS AND OTHER EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR MEMBERS AND OTHER EMPLOYEES THAT:

WE WILL NOT fail or refuse to fully implement the June 25, 1984 arbitration award of Arbitrator Harry L. Johnson rendered in Audie L. Murphy Memorial Veterans Hospital, Veterans Administration, San Antonio, Texas and American Federation of Government Employees, Local 3511, San Antonio, Texas, Arbitration File No. 84K/02774.

WE WILL fully comply with the June 25, 1984 award of Arbitrator Harry L. Johnson, including purchasing the required one-half page ad in all San Antonio daily newspapers, and contacting the local television stations as directed requesting that they announce that the previously broadcast accusations of the Union were erroneous.

____
(Union)

Dated:____________________ By:______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VI, whose address is: Federal Office Building, 525 Griffin Street, Suite 926, Dallas, Texas 75202 and whose telephone number is (214) 767-4996.

23 FLRA No. 78

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE
UNITED STATES MARSHALS SERVICE

Activity

and

Case No. 0-AR-977

INTERNATIONAL COUNCIL OF U.S.
MARSHALS SERVICE LOCALS, AFGE

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Thomas L. Hewitt filed by the Department of Justice (the Agency) under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition and the Office of Personnel Management filed a brief as an amicus curiae.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance in this case concerns the suspension of the grievant for malicious false statements and for an unexcused absence. On December 28, 1983, the Activity proposed to suspend the grievant for 5 days. On January 3, 1984, the grievant amended a previously filed unfair labor practice charge to claim that the Activity was threatening him with disciplinary action as a reprisal against him for protected activity. On January 4, 1984, he filed a formal complaint under statutory equal employment opportunity (EEO) procedures alleging he had been discriminated against because of his race and age and demanding that he not be suspended as proposed. On March 27, 1984, the Activity issued a final decision suspending the grievant for 5 days. On April 23, 1984, the grievant filed a grievance which was submitted to arbitration protesting that the suspension was discriminatory and not for just cause.

In the proceeding before the Arbitrator, the Activity argued that under section 7121(d) of the Statute, 1/ the grievance was barred by the earlier-filed EEO complaint. The Activity also argued that under section 7116(d) of the Statute, the grievance was barred by the earlier-filed amended unfair labor practice charge. The Arbitrator acknowledged that the EEO complaint was filed before the grievance and expressly concerned the suspension action. The Arbitrator found that "[t]he EEO complaint is therefore recognized as the employee's option in this case." However, the Arbitrator further found that the grievant had exercised his option under section 7121(d) only as to the issue of discrimination in the matter. He ruled that the issue of whether the suspension was for just cause had not been raised elsewhere and therefore was not precluded by section 7121(d). He similarly ruled that the issue of just cause in the matter was also not precluded by section 7116(d). On the issue of just cause, the Arbitrator determined that only the unexcused absence charge was sustained and he reduced the suspension to 1 day.

III. EXCEPTIONS

In its exceptions the Agency contends that the award is contrary to section 7121(d) of the Statute.2/ Specif-

---

1/ Section 7121(d) pertinently provides:

> (d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first.

2/ The Agency also contends that the award is contrary to section 7116(d) of the Statute.

ically, the Agency argues that the grievance was barred by the grievant's earlier filing of a formal complaint of discrimination under statutory EEO procedures. The Agency maintains that contrary to the finding of the Arbitrator, the matter the grievant elected to raise under the statutory procedure was the matter of his suspension allegedly because of his race and age, a prohibited personnel practice under 5 U.S.C. § 2302(b)(1).[3] Thus, the Agency asserts that the raising of the matter of his suspension subsequently under the negotiated grievance procedure was precluded by section 7121(d) which provides the employee an option, but bars use of both procedures.

IV. ANALYSIS AND CONCLUSIONS

Section 7121(d) effectively provides that when an employee affected by a prohibited personnel practice under section 2302(b)(1) has timely raised the matter under an applicable statutory procedure, the matter subsequently may not be raised as a grievance. In American Federation of Government Employees, Local 3230, AFL-CIO and Equal Employment Opportunity Commission, 22 FLRA No. 44 (1986), the Authority identified the two conditions of section 7121(d) which must be met in order for a grievance to be precluded:

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[3] Section 2302(b)(1) pertinently provides:

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--
>
> (1) discriminate for or against any employee or applicant for employment--
>
> (A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);
>
> (B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a)[.]

1. The matter which is the subject of the grievance is the same matter which is the subject of the action initiated under the statutory procedure, and

2. Such matter was earlier raised by the employee timely initiating an action under the statutory procedure.

In this case we conclude that both of the conditions of section 7121(d) were met and that consequently the matter before the Arbitrator was precluded by the Statute from being raised as a grievance.

Specifically, we find in this case that the term "matter" as used in section 7121(d) refers not to the issue or claim of prohibited discrimination, but, rather, to the suspension action. The term "matter" described in section 7121(d) pertains to prohibited personnel practices under section 2302(b)(1). In turn, section 2302(b) describes prohibited personnel practices in terms of "any personnel action" with "personnel action" defined in section 2302(a)(2)(A)(iii) to include a suspension for 14 days or less. Section 2302(b)(1) prohibits any employee who has authority to take, direct others to take, recommend, or approve any personnel action from discriminating with respect to such personnel action authority. Thus, a personnel action is central to the prohibited practice of section 2302(b)(1) and specifically encompasses recommended and approved personnel actions. Accordingly, we find that the matter raised both by the grievance and the formal complaint of discrimination was the suspension, either proposed or final, of the grievant.

As noted, the Arbitrator acknowledged that the EEO complaint expressly concerned the suspension action. The complaint expressly referenced the suspension action and the grievant in the complaint expressly requested as corrective action that he not be suspended as proposed. This is in contrast to the situation presented in EEOC, 22 FLRA No. 44. In that case there was no express reference in the EEO complaint to the suspension action over which the grievance was filed and no requested corrective action in the complaint relating to that suspension. Accordingly, we agreed with the arbitrator that the matters raised by the EEO complaint and the grievance in that case were different and denied the exception contending otherwise.

In summary, there was an election by the grievant, the aggrieved employee, to raise the matter in this case under the statutory EEO procedures. The Authority has recognized that a primary purpose and effect of election-of-remedy provisions of the Statute is to prevent relitigation of a matter in another forum after a choice of procedures in which to raise the matter has been made by the aggrieved party. *See U.S. Department of Justice, United States Marshals Service and International Council of U.S. Marshals Service Locals, AFGE*, 23 FLRA No. 60 (1986). Slip op. at 4. Thus, since it is undisputed that the complaint was filed first, the matter raised by the grievant in his formal EEO complaint was prohibited from being relitigated under the negotiated grievance procedure. Consequently, the grievance before the Arbitrator was precluded by the Statute from consideration.

V. DECISION

For these reasons, the award is deficient as contrary to section 7121(d) of the Statute and is set aside.[4]

Issued, Washington, D.C., October 7, 1986.

J. L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[4] In view of this decision, it is not necessary that we address the Agency's other exception to the award.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

MARINE CORPS LOGISTICS BASE
BARSTOW, CALIFORNIA

Activity

and

Case No. 0-AR-1137

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1482

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Joseph Gentile filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., September 29, 1986.

L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL DEPOSIT
INSURANCE CORPORATION

Agency

and

Case No. 0-AR-1158

NATIONAL TREASURY
EMPLOYEES UNION

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator John P. McGury filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Agency has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Agency's exceptions are denied.

Issued, Washington, D.C., September 29, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION
BOSTON REGION

Activity

and

Case No. 0-AR-1160

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1164

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator David R. Bloodsworth filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Agency has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Agency's exceptions are denied.

Issued, Washington, D.C., September 29, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FOOD AND NUTRITION SERVICE
U.S. DEPARTMENT OF AGRICULTURE

Agency

and

Case No. 0-AR-1190

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 226

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Charles E. Donegan filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Agency has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Agency's exceptions are denied.

Issued, Washington, D.C., September 29, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2309

Union

and

Case No. 0-AR-1214

SOCIAL SECURITY ADMINISTRATION

Agency

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Sidney J. Kronish filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., October 7, 1986.

Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE ARMY
NEW ORLEANS CORPS OF ENGINEERS

Activity

and

Case No. 0-AR-1217

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1124

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Samuel J. Nicholas filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., October 7, 1986.

J. L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SACRAMENTO AIR LOGISTICS CENTER
MC CLELLAN AIR FORCE BASE

Activity

and

Case No. 0-AR-1227

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1857, AFL-CIO

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Emily Maloney filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Agency has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Agency's exceptions are denied.*/

Issued, Washington, D.C., October 7, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ The Agency's request for a stay is likewise denied.

9/Case NO. 397 Errata

Federal Labor Relations Authority

Washington, D.C. 20424

ERRATA November 9, 1986

Report of Case Decisions Number 397 (October 22, 1986) 1/

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Attach 23 FLRA No. 84 1. Insert pages at end of report.

Attachment

1/ Attached pages failed to be printed with the report.

Y3.F31/21-3:

(23 FLRA No. 84)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HEADQUARTERS, UNITED STATES
ARMY TRAINING CENTER AND
FORT JACKSON, FORT JACKSON,
SOUTH CAROLINA

Respondent

and

Case No. 4-CA-50066

LEROY W. HOWELL, AN INDIVIDUAL

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Decision of the Administrative Law Judge filed by the Charging Party, Leroy W. Howell.[1] The complaint alleged that the Respondent had violated section 7116(a)(1) of the Statute by advising Howell that he could not file a grievance under the terms of the applicable collective bargaining agreement because he was not a bargaining unit employee. The issue before the Authority is whether the Judge properly dismissed the complaint.

II. Background

On September 21, 1984, Howell sent a letter to his supervisor stating that the letter served as official notification that he was grieving his change in duty hours and requesting that the individual who was the local union president represent him. The union president felt that he could only represent Howell as an individual since Howell,

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[1] The Respondent filed a motion to dismiss the exceptions. However, no basis is provided for dismissing the exceptions under the Authority's Rules and Regulations.

READEX FICHE best copy available

in the president's view, was a supervisor. Howell's supervisor returned what he termed the "letter of grievance" for clarification, stating in addition that Howell was a supervisor and must file the grievance under the Department of the Army grievance procedure. In response to the request for clarification, Howell replied, identifying the reply as step 1 of the "grievance procedure," seeking reinstatement of his previous duty hours. He also requested clarification of the status of his position as supervisory or nonsupervisory and again requested by name to be represented by the local union president. Howell's immediate supervisor maintained his original position that Howell was a supervisor and could not file a grievance under the negotiated procedure. Subsequently, Howell's supervisor processed the grievance under the agency grievance procedure and denied the grievance at the first step. He also stated, as to the request for representation, that the local union president could be a personal representative under the agency procedure, but could not represent Howell under the negotiated grievance procedure.

After the rejection of his grievance by his immediate supervisor, Howell filed the unfair labor practice charge against the Respondent alleging that it had interfered with his right to file a grievance under the negotiated grievance procedure. Howell did not pursue his grievance under the negotiated grievance procedure. This choice appears to have been made freely by Howell. There is no evidence that any management official, by statement or act, attempted to interfere with, restrain, or coerce Howell from filing further appeals under the negotiated grievance procedure. And more specifically, there is no evidence that any official of the Respondent indicated to Howell that Respondent would have refused to participate in or respond to the invocation of further grievance and arbitration procedures had he or the Union chosen to invoke them. However, the Post Commander indicated in a subsequent letter to Howell that he also supported the position taken by Howell's supervisor.

III. The Judge's Decision

The Judge dismissed the complaint on the basis that Howell was a supervisor and that consequently the Respondent did not violate the Statute by refusing to process his grievance under the negotiated grievance procedure.

IV. Exceptions

The Charging Party filed exceptions to the Judge's dismissal of the complaint essentially arguing that the Judge erred by determining that he, Howell, was a supervisor.

V. Analysis

The Authority adopts the Judge's conclusion that the complaint must be dismissed, but not for the reasons stated by the Judge. Instead, the Authority finds that there was no violation in the circumstances of this case because the Respondent did nothing more than assert and maintain its position that Howell was a supervisor who was not covered by -- and therefore could not process a grievance under -- the negotiated grievance procedure. An agency does not impede or obstruct the submission of unresolved grievances to binding arbitration or otherwise violate the Statute by maintaining a position in processing an employee's grievance that the employee is a supervisor, even if the agency later is found to have been incorrect. See Harry S. Truman Memorial Veterans Administration Hospital, Columbia, Missouri, 11 FLRA 516 (1983), in which the Authority held that an agency has not impeded or obstructed the submission of unresolved grievances to binding arbitration merely by asserting that the matter in dispute was not grievable or arbitrable.

In this case, the essence and substance of the Respondent's conduct was an assertion of its position that the grievance was not subject to the negotiated grievance procedure. Although the Respondent acted on the dispute under the terms of the agency grievance procedure, the General Counsel has failed to establish that the Respondent impeded or obstructed the processing of the grievance under the negotiated procedure. Rather, it would appear that Howell's immediate supervisor merely maintained his original position that Howell, as a supervisor, could not file a grievance under the negotiated procedure. In this regard, the Authority notes that after the rejection of his grievance on that basis, Howell did not attempt to continue processing the grievance under the subsequent steps of the negotiated grievance procedure or seek to have the Union invoke arbitration on his behalf. Instead, he directly filed an unfair labor practice charge.

It is unlikely that had Howell pursued his grievance and exhausted his appeals under the negotiated grievance procedure, that the matter would have been resolved in arbitration. Both the Union and the Agency were in agreement that he was a supervisor.[2] Nevertheless, the only avenue available to him under

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[2] Similarly, since there was no disagreement between the exclusive representative and the activity -- the parties to the collective bargaining relationship -- concerning the

Continued

the Statute and the parties' collective bargaining agreement was to exhaust the steps of the negotiated grievance procedure and then attempt to persuade the Union to invoke arbitration to resolve his grievance over the change in his hours of work. If Howell had succeeded, the arbitrator would have had for resolution the collateral threshold grievability/arbitrability issue concerning whether Howell was in the bargaining unit or excluded as a supervisor.

The Authority has held in this regard that an arbitrator may make a factual determination regarding the bargaining unit status of a grievant in the course of deciding whether the arbitrator has jurisdiction to resolve the grievance under the negotiated grievance procedure. National Archives and Records Service, General Services Administration and Local 2578, American Federation of Government Employees, AFL-CIO, 9 FLRA 381, 383 (1982). The Authority cautioned, however, that the negotiated grievance procedure and arbitration may not be used in place of a clarification of unit petition. The Authority has found that an arbitrator may not determine the bargaining unit status of an individual where the issue of status is not a collateral question of grievability but instead is the essential issue of the grievance. Office of Hearings and Appeals, Social Security Administration, Department of Health and Human Services and Local 3615, American Federation of Government Employees, AFL-CIO, 20 FLRA No. 96 (1985). Of course, the Union never invoked arbitration and the Respondent never indicated that it would refuse to participate in such a proceeding.

While we thus agree with the Judge's conclusion that the complaint must be dismissed, we conclude that he need not and should not have made a unit determination as to Howell's status and resolved the case on that basis. It is appropriate in certain circumstances for an Administrative

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(Continued)

composition of the unit for which the Union was certified, a clarification of unit (CU) proceeding would be unavailable. See section 2422.1(d) of the Authority's Rules and Regulations, which only provides for the filing of a CU petition "by an activity or agency or by a labor organization which is currently recognized by the activity or agency as an exclusive representative."

Law Judge to make unit determinations within the context of an unfair labor practice proceeding.3/ However, in this matter the Judge's supervisory status finding was not germane or necessary to his unfair labor practice determination, and should not have been made in the context of this proceeding. Rather, a question of an individual's bargaining unit status and entitlement to use the negotiated grievance procedure is a question of grievability and arbitrability for resolution by an arbitrator when the question is raised as a collateral issue to a grievance otherwise properly brought under the negotiated grievance procedure. See, for example, Harry S. Truman Memorial Veterans Administration Hospital, Columbia, Missouri, 11 FLRA 516 (1983).

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and accordingly affirms those rulings. The Authority has considered the Judge's Decision, the positions of the parties and the entire record, and adopts the Judge's findings and conclusions only to the extent consistent with this decision. For the reasons set forth above, we conclude that the Respondent's continued insistence that Howell was a supervisor and was not entitled to use the negotiated grievance procedure was not violative of the Statute. Thus, the complaint must be dismissed.

3/ See, for example, Internal Revenue Service Seattle District, 12 FLRA 324 (1983) and National Archives and Records Service and National Archives Trust Board, General Services Administration, Washington, D.C., 9 FLRA 413 (1982), wherein the Authority found that management violated section 7116(a)(1) and (8) of the Statute by removing employees from dues withholding in the erroneous belief that the employees had become supervisors.

(23 FLRA No. 84)

ORDER

The complaint in Case No. 4-CA-50066 is dismissed.

Issued, Washington, D.C., October 21, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(23 FLRA No. 84)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

HEADQUARTERS, UNITED STATES ARMY
TRAINING CENTER AND FORT JACKSON,
FORT JACKSON, SOUTH CAROLINA

Respondent

and

LEROY W. HOWELL, AN INDIVIDUAL

Charging Party

Case No.: 4-CA-50066

Michael T. Russell, Esquire
Ms. Virginia Combs
For the Respondent

Richard S. Jones, Esquire
For the General Counsel

Mr. Leroy W. Howell
Pro se

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101 *et seq.*,[1] and the Final Rules and Regulations issued thereunder,

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, *e.g.*, Section 7116(a)(1) will be referred to, simply, as "§16(a)(1)".

5 C.F.R. § 2423.1, et seq., concerns whether Mr. Leroy W. Howell was a supervisor within the meaning of § 3 (a)(10) of the Statute. For reasons set forth hereinafter, I find that Mr. Howell was a supervisor and, accordingly, Respondent did not violate § 16(a)(1) by refusing to entertain Mr. Howell's grievance under the negotiated grievance procedure.[2] This case was initiated by a charge filed on November 1, 1984 (G.C. Exh. 1(a)). The Complaint and Notice of Hearing issued on January 25, 1985 (G.C. Exh. 1(c)), the hearing to be held on March 19, 1985, at a place to be designated; and by Order dated February 21, 1985, the place of hearing was designated (G.C. Exh. 1(f)), pursuant to which a hearing was duly held on March 19, 1985, in Columbia, South Carolina, before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, and were afforded opportunity to present oral argument. At the close of the hearing, April 22, 1985, was fixed as the date for mailing post-hearing briefs and the General Counsel and Respondent[3] each timely filed a brief, received on, or before, April 24, 1985, which have been carefully considered. Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings and Discussion

§ 3(a)(10) of the Statute defines "supervisor" as follows:

> "(10) 'supervisor' means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgement, except that, with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such authority;"

Mr. Leroy W. Howell, the Charging Party, has been employed at Fort Jackson since October 29, 1967. In 1982, Mr. Howell's title was "Lead

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[2] Mr. Howell declined to process his grievance under the Department of Army grievance procedure. (Tr. 20).

[3] Respondent submitted a single copy of its brief, entitled "Closing Argument" rather than an original and four copies required by § 2423.25 of the Regulations.

Sports Specialist"; but on August 8, 1982, his title was changed to "Supervisory Sports Specialist" (G.C. Exh. 2). At that time, Mr. Howell was, as he testified, ". . . in charge of the Morale Support Gymnasium [Lee Field House]. I had control of the Gymnasium, I managed the gymnasium, I directed the work force there and I had a staff which comprised of sometimes 8 to 10 military and 3 civilians. . . ." (Tr. 35). In December, 1982, Mr. Howell left Fort Jackson for an overseas assignment which was expected to last at least three years; however, because of illness, Mr. Howell returned to Fort Jackson in January, 1984, in a sick leave status, and underwent heart by-pass surgery in January, 1984, and in July, 1984, had double hernia surgery. As a result, except for limited periods and restricted activity, Mr. Howell did not return to full duty, full time until late August, 1984.

When Mr. Howell left for overseas duty his position of Supervisory Sports Specialist remained encumbered for him upon his return from the overseas assignment. The position of Supervisory Sports Specialist was filled in the fall of 1983 by Dr. Carporvitz (Tr. 158). In December, 1983, the Physical Activities Branch (Res. Exh. 8), now Recreation Division (Res. Exh. 7), gave up Lee Field House (Moral Support Gymnasium) and received another building, Perez Center, several blocks from Lee Field House (Tr. 172); however, in December the Perez Center was being used temporarily by the Nursery (Tr. 226). It was planned that Perez Center would be operated as a health spa type facility for physical fitness and, specifically, be designed and constructed to provide privacy, especially for females (Tr. 172A). Extensive renovation was undertaken and the Perez Center was not opened until May, 1984 (Tr. 172-172A).

Initially, Dr. Carporvitz, as had Mr. Howell prior to his departure, was in charge of Lee Field House and had under his supervision Messrs. Cook and Trakas (both GS-5's), Mr. Mitchell (GS-3) and two full-time military physical fitness specialists (an E-5 and an E-3), which was essentially the same complement as had been directed by Mr. Howell - indeed both Mr. Cook and Mr. Trakas had been under Mr. Howell's supervision and, while Mr. Howell testified he had three civilians, Mr. Mitchell did not come over into Sports until 1983. With the loss of Lee Field House, in December, Dr. Carporvitz was placed in charge of Outdoors Recreation and of Perez Center, although, as noted, Perez Center did not become an operating facility until May, 1984, and Messrs. Cook, Trakas and Mitchell, after the loss of Lee Field House, worked entirely on grounds maintenance and on Outdoors Recreation facilities. Lt. Colonel Gibson, Mr. Howell's and Dr. Carporvitz's overall supervisor (Tr. 154) testified, without contradiction, that Dr. Carporvitz functioned as a supervisor (Tr. 135, 162, 163, 164, 166, 167). Mr. John Everett, who, as Sports Director, had been Mr. Howell's immediate supervisor, left in August, 1983 (Tr. 129, 130). He was succeeded by Mr. William John Rashleigh who began work in January, 1984, shortly before Mr. Howell returned (Tr. 221). At, or shortly after, Mr. Rashleigh's arrival, Mr. Trakas was transferred to Mr. Rashleigh's supervision (Tr. 183, 222).

Col. Gibson, a very credible witness, testified that when Mr. Howell arrived in January, 1984, he offered him one of two positions: either Dr. Carporvitz's position (new Perez Fitness Center and Outdoor Recreation) or Supervisor of Weston Lake. Col. Gibson stated that Mr. Howell indicated that he wanted his old position back, which was essentially the one that Dr. Carporvitz had, and that he, Col. Gibson, said ". . . fine, you have that, and Dr. Carporvitz will go out to Weston Lake". (Tr. 172B).[4] Accordingly, Mr. Howell, nominally took over both the Perez Center and Outdoor Recreation in January, 1984; however, because Mr. Howell was on sick leave, and shortly thereafter had heart by-pass surgery, he was unable to undertake the coordination and supervision of the extensive renovation project to get the Perez facility ready for operation (Tr. 174). Subsequently, Col. Gibson decided to recruit a full time manager for the Perez Fitness Center and to remove those duties from Mr. Howell, leaving him with Programming and Supervising the Outdoor facility section (Tr. 174). Mr. Howell testified that he did not "even" report for work until March 15, 1984, "or somewhere around there". (Tr. 92). From the time Mr. Howell reported to work, only Mr. Cook remained full time under his supervision, although from time to time military personnel were assigned on detail and, later, during the summer, he had CETA employees. Mr. Cook left in June, 1984 (Tr. 84), for employment with the Columbia Post Office (Tr. 133). Mr. Trakas' job had been abolished shortly before Mr. Cook's departure (Tr. 201) and when Mr. Cook left, Mr. Trakas, on a non-competetive basis, "rolled over" to the vacant position (Tr. 176-177) so that Mr. Howell's staff remained at one full time civilian employee. As noted above, Mr. Howell was on sick leave again from July 17 to August 27, 1984 (Tr. 91).

At least two other full time positions are authorized for Mr. Howell's staff but due to lack of appropriations remain unfilled (Tr. 178-179). With the beginning of the new fiscal year in October, 1984, recruitment was undertaken to fill one of the authorized Recreation Aid slots. Mr. Howell testified that Mr. Rashleigh recommended that he, Howell, hire a Mr. Russell (Rusty) Smith (Tr. 51); but Mr. Howell knew that Mr. Smith had had trouble with his supervisors and, after interviewing Mr. Smith, Mr. Howell declined to hire Mr. Smith and asked for a new list with at least three names on it (Tr. 52-53). The recruitment action was on-going at the time of the hearing; but it is clear that Mr. Howell has the responsibility to select, and will select, the new member of his staff (Tr. 178-179). Col. Gibson stated that, because of the continuing shortage of appropriated funds, the position will now be filled as a non-appropriated fund position.

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[4] Dr. Carporvitz left abruptly at the end of January, 1984 (Tr. 221) for a better paying position in Manila (Tr. 199-200).

Conclusions

It is clear that Mr. Howell's position description clothes him with all authority of a supervisor. General Counsel asserts that notwithstanding his apparent authority, i.e., the duties specified in his job description, Mr. Howell has never exercised sufficient authority to constitute him a supervisor. Thus, General Counsel asserts that Mr. Howell has never made an annual performance appraisal for any employee. Mr. Cook stated that Mr. Howell was his supervisor; but was "not sure" and couldn't remember (Tr. 134) whether Mr. Howell ever signed any of his performance appraisals. Mr. Rashleigh testified that he had seen a performance appraisal for Mr. Cook signed by Mr. Howell before Mr. Howell left for his overseas assignment (229-230). While it is true that no performance appraisal for Mr. Cook signed by Mr. Howell was introduced as an exhibit, it is at least equally significant that no performance appraisal for any employee, i.e., Cook, Trakas, Mitchell or full-time military sports specialists, was shown to have been made after Mr. Howell was made a supervisor on August 8, 1982, and prior to his departure for Europe in December, 1982. Stated otherwise, Mr. Howell was a supervisor only from August 8, 1982, until his departure in December, 1982, and there is no evidence whatever that performance appraisals were made by any other supervisor for any employee under his supervision after he became a supervisor in August until he left in December, which would have detracted seriously from his having been a true supervisor. On the other hand, if no performance appraisals were "due" during this period, the fact that Mr. Howell had no occasion to appraise employees would be meaningless.

It is true that Mr. Howell has not made a performance appraisal for Mr. Trakas since Mr. Trakas was assigned to him in June, 1984; but the record is clear that he has not done so for the simple reason that none was "due" for Mr. Trakas. It is also clear that Mr. Howell will appraise Mr. Trakas in the future. More important, Mr. Howell, as Mr. Cook's then first line supervisor, did decide three grievances which had been filed by Mr. Cook[5/] (Res. Exh. 2, 3 and 4). Mr. Howell testified that he told Col. Gibson ". . . I can help you get rid of those hang-over grievances" (Tr. 61); and Mr. Howell wrote the draft of each letter. The fact that Mr. Kinlaw, then a Labor Relations Specialist, put each in proper format does not detract from the fact that Mr. Howell made each decision (Tr. 258 - 259). Mr. Howell prepares schedules for his employees and, in doing so,

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[5/] The grievances appear to have been filed March 19, 1984. In view of Mr. Howell's absence on sick leave, it is understandable that Mr. Cook was uncertain who his supervisor was at that time. Each of Mr. Howell's decisions is dated 3 March 1984 which date obviously is incorrect. In all probability the date of each decision was March 30, 1984, or possibly April 2-5, as each was received by the Civilian Personnel Office on April 5, 1984, at 3:15 p.m.

can and does change the normal duty hours to meet changing needs. Having scheduled Mr. Cook's hours, Mr. Howell, shortly before Mr. Cook left Fort Jackson in June, 1984, declined to change his hours in the belief that two week notice was required (Tr. 247). Mr. Rashleigh believed the Regulations permitted hours of duty to be changed without two weeks notice and changed Mr. Cook's hours when he was needed to handle a boxing smoker. When Mr. Cook filed a grievance, Mr. Howell declined to act as the step 1 supervisor ". . . because . . . I think he agreed with the grievance and therefore didn't want to be involved in making a judgement" (Tr. 229) and Mr. Rashleigh acted on it (Tr. 229, 247-248). However, even in this instance, Mr. Howell exhibited independent judgment by refusing to take action he believed wrong even though his supervisor disagreed and Union President Brown agreed with Mr. Rashleigh's action (Tr. 248).

Mr. Trakas testified that Mr. Howell is his supervisor; Mr. Howell does direct the work of Mr. Trakas, detailed military, and CETA employees; Mr. Howell can, and does recommend overtime (Tr. 248-249); and Mr. Howell has shown wholly independent judgment in selecting a new employee for his staff. Mr. Howell has the authority to exercise all functions of a supervisor, has exercised such authority when required, e.g., in deciding grievances and employing a new staff member, and will exercise other authorized supervisory duties as they arise, e.g., making employee appraisals. The fact that a supervisor has only one employee under his supervision does not mean that such person is not a supervisor within the meaning of the Statute. Headquarters III Corps and Fort Hood, Fort Hood, Texas, 13 FLRA No. 84, 13 FLRA 479 (1983); The Adjutant General, Delaware National Guard, 9 FLRA No. 1, 9 FLRA 3, 9 (1982). Here, of course, Mr. Howell not only supervises one full-time employee, Mr. Trakas, but a second full-time employee is being recruited for his staff, with a third full-time slot being authorized and awaiting only the availability of funds. In addition, Mr. Howell supervises military personnel on detail[6] and CETA, or equivalent, employees.

Accordingly, I conclude that Mr. Howell was, and is, a supervisor within the meaning of the Statute and, therefore, was not subject to the terms of the negotiated agreement and Respondent did not violate the Statute by refusing to entertain his grievance under the negotiated agreement. Therefore, I recommend that the Authority adopt the following:

6/ In view of the wording of the Statute which excludes "a member of the uniformed services" as an employee (§ 3(a)(2)) and the definition of supervisor to supervise "employees", if a person supervises only military personnel, that person is not a supervisor within the meaning of the Statute; however, if that person supervises one or more employees, then the supervisory authority over military personnel may also be considered.

ORDER

The Complaint in Case No. 4-CA-50066 be, and the same is hereby, dismissed.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: May 20, 1985
Washington, DC

9/Case No. 397

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 397 REPORT OF CASE DECISIONS October 22, 1986

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UNFAIR LABOR PRACTICE CASES

23 FLRA No. 80 (October 14, 1986)

Department of the Army Dugway Proving Ground Dugway, Utah and National Association of Government Employees, Local R14-62, Case No. 7-CA-50559

23 FLRA No. 82 (October 16, 1986)

Marine Corps Logistics Base Barstow, California and American Federation of Government Employees, Local 1482, AFL-CIO, Case No. 8-CA-50418

23 FLRA No. 83 (October 16, 1986)

Department of the Air Force Eielson Air Force Base, Alaska and American Federation of Government Employees, Local 1836, AFL-CIO, Case No. 9-CA-30009

23 FLRA No. 84 (October 21, 1986)

Headquarters, United States Army Training Center and Fort Jackson, Fort Jackson, South Carolina and Leroy W. Howell, an individual, Case No. 4-CA-50066

NEGOTIABILITY CASE

23 FLRA No. 79 (October 14, 1986)

National Federation of Federal Employees, Local 29 and Kansas City District, Corps of Engineers, Kansas City, Missouri, Case No. 0-NG-1050

Y3.F31/21-3:

ARBITRATION CASES

23 FLRA No. 81 (October 16, 1986)

Franklin Lodge No. 2135 International Assocation of Machinists and Aerospace Workers, AFL-CIO and Bureau of Engraving and Printing U.S. Department of the Treasury (Blackwell, Arbitrator), Case No. O-AR-1101

*Case No. O-AR-1054 (Order Denying Request for Reconsideration of 22 FLRA No. 2) (October 9, 1986)

Patent and Trademark Office and Patent Office Professional Association

In the following arbitration cases, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

October 9, 1986

O-AR-1212

October 14, 1986

O-AR-1169 O-AR-1216 O-AR-1219

October 22, 1986

O-AR-1234 O-AR-1233

*NOTE Bound volume page numbers will not be assigned to the decisions marked with an asterisk at this time.

Federal Labor Relations Authority

23 FLRA No. 79

NFFE, Local 29 and Kansas City District, Corps of Engineers, Kansas City, Mo., Case No. 0-NG-1050 (Decided October 14, 1986)

SUBJECT MATTER INDEX ENTRIES

- FPM Supplement 335-1
- Negotiability
  - Management Rights
    - Fill Positions
      - Minimum Area of Consideration
  - Positions, Filling of
    - Area of Consideration
      - Rate Bargaining Unit Employees Prior to Expanding Area
    - Crediting Plans
      - Job Analysis
      - Weight Given Knowledge, Skills, Abilities
      - 5 C.F.R. section 300.103(a)
    - Rating Panels
      - Requirement to Use
- 5 C.F.R. 335.103

STATUTE

7105(a)(2)(E)
7106(a)(2)(B) and (C)
7117(a)(1)

DIGEST NOTES

A proposal is negotiable that requires the agency to consider unit employees for vacant positions prior to expanding the minimum area of consideration to include other appropriate sources. The proposal does not violate management's right to select under section 7106(a)(2)(C). (proposal 1)

Proposals are nonnegotiable that set forth the weight that knowledge, skills, abilities and other factors (KSAOs) are to be given in evaluating candidates for positions, although the proposals do not define the applicable KSAOs. One section of the proposal would apply the same point scale to each KSAO -- that is, under the proposal, each of the KSAOs is presumed to be of equal value in evaluating the candidate under the crediting plan. Another section would establish the respective weights to be given to the supervisory evaluation and the candidates' responses, and would add additional specified points to a candidates' overall rating based upon education and performance rating. The proposals are not in any way based on job analysis which shows a connection between the proposals and the positions for which the candidates are applying. Accordingly, the proposals are inconsistent with 5 C.F.R. section 300.103(a). [proposals 2(a), 2(b) and 3(b)]

A proposal is within the duty to bargain that requires the agency to (1) rate and rank bargaining unit applicants prior to expanding the area of consideration for a position and (2) use a panel for the rating and ranking process where there are three or more qualified bargaining unit applicants. The proposal is not intended to require the agency to select a unit employee and does not preclude the agency from expanding the area of consideration. Thus the proposal is a negotiable procedure which does not directly interfere with management rights.

Federal Labor Relations Authority

23 FLRA No. 80

Dep't of the Army, Dugway Proving Ground, Dugway, Utah and NAGE, Local R14-62, Case No. 7-CA-50559 (Decided October 14, 1986)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practices
  - Conditions of Employment
    - Non-Housekeeping Quarters
      - Assignment to Bachelors
  - Facilities, Equipment and Services
    - Non-Housekeeping Quarters
      - Geographical Bachelor
  - Refusal to Negotiate
    - Non-Housekeeping Quarters
  - Remedy
    - *Status Quo Ante*
      - Disruptive to Agency Operations
      - Make Whole for Increase Expenses

STATUTE

7103(a)(14)
7105(g)(3)
7116(a)(1) and (5)
7118(a)(7)

DIGEST NOTES

The past practice of assigning government-owned, on-post, non-housekeeping quarters to geographical bachelors is a condition of employment within the meaning of section 7103(a)(14) at the activity's remote installation located approximately 45 miles from the nearest community where limited housing was available. To reach the activity's installation requires more than an hour commute over a mountain pass which is either impassable or extremely hazardous during winter storms. Geographical bachelors (i.e. civilian employees with dependents who are eligible for family quarters and may or may not be on the waiting list for such quarters, and who live at the activity's installation but maintain and commute on weekends to and from a primary residence outside the installation) had been afforded such housing for approximately 10 years. Although the activity stated that the installation was not a hardship station, the activity nevertheless conceded that the availability of housing had a significant impact on civilian employee recruitment and retention. There was a financial benefit to residing in on-post housing because those employees had reduced daily commuting costs. Accordingly, the activity's failure to bargain over a change in the established practice of assigning government-owned, on-post quarters to geographical bachelors was a violation of section 7116(a)(1) and (5).

A status quo ante remedy was not warranted for the activity's failure to negotiate a change in its housing policy for bachelors at a remote installation. To carry out such a remedy would require the eviction of other bona fide residence from available activity housing who replaced the evicted bachelors. Further, the activity offered all of the evicted bachelors alternative housing so none were actually foreclosed from continuing on the same work schedule. Instead, the Authority ordered that the activity make whole the affected employees for their increased expenses suffered as a result of their eviction.

Federal Labor Relations Authority

23 FLRA No. 81

Franklin Lodge No. 2135, IAM and Bureau of Engraving and Printing, U.S. Dep't of the Treasury (Blackwell, Arbitrator), Case No. 0-AR-1101 (Decided October 16, 1986)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Award Modified
    - Award Contrary to Applicable Law
      - 5 U.S.C. section 5544
    - Award Contrary to Appropriate Regulation
      - 5 C.F.R. part 532, subpart E
  - Exceptions Asserted in Appeal
    - Award Contrary to Applicable Law
      - 5 U.S.C. section 5544
    - Award Contrary to Appropriate Regulation
      - 5 C.F.R. part 532, subpart E
  - Premium Pay
    - Overtime
      - Hour of Work for Determining Overtime Eligibility
        - Regularly Scheduled Workdays - Employee in Nonpay Status
    - Prevailing Rate Employee [5 U.S.C. section 5349]
- 5 C.F.R. section 532.503 and 532.503(a)(1)
- 5 C.F.R. 551.401(b)
- 5 C.F.R. part 551
- 5 C.F.R. section 551.501
- 5 C.F.R. section 532.503(b)(3)
- 29 U.S.C. section 201 et seq. [Fair Labor Standards Act]

STATUTE

7122(a)

DIGEST NOTES

The arbitrator found that in view of the grievant's one day furlough, the agency was obligated to omitted the grievant from Saturday work scheduled in the same week. The grievant, a prevailing rate employee [5 U.S.C. section 5349], would have been compensated at the straight-time rate under the circumstances rather than the overtime rate for Saturday work. Since the agency did not omit the grievant from the Saturday work, the arbitrator held that its actions constituted a mishandling of the grievant's rights in violation of the parties' collective bargaining agreement which was not offset by the grievant choosing to not exercise certain other option available to him.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

As his award, the arbitrator sustained the grievance and directed that the agency pay the grievant at the overtime rate for work performed on that Saturday.

In its exceptions the agency contended that the award was contrary to law and applicable regulation. In modifying the award, the Authority held that the award of overtime to the grievant who had not actually been in pay status for more than 40 hours in the week, was contrary to 5 U.S.C. section 5544 and 5 C.F.R. part 532, subpart E. Although the arbitrator could properly determine that the activity had violated the parties' agreement, he could not properly enforce the agreement in fashioning a remedy for the violation to direct the payment of overtime pay to the grievant when not authorized by law.

Employees, as the grievant in this case, whose pay is fixed and adjusted in accordance with prevailing rates under 5 U.S.C. section 5349, are entitled to overtime pay pursuant to 5 U.S.C. section 5544 and 5 C.F.R. part 532, subpart E. As relevant to this case, an employee is entitled to overtime pay for hours of work in excess of 40 hours in a week. In determining whether an employee is entitled to overtime pay for work performed in excess of 40 hours in a week, 5 C.F.R. section 532.503(b)(3) provides that all hours of regularly scheduled workday during which an employee is in a nonpay status, such as on furlough, are not to be considered hours of work in determining whether the employee is entitled to overtime pay for work performed in excess of 40 hours in a week. Because the grievant was furloughed the first day of the week, by working 8 hours of Saturday, the hours of work of the grievant only equaled rather than exceeded 40 hours in the disputed workweek. Accordingly, payment of overtime to the grievant for the hours of work on Saturday was precluded by law and regulation.

Federal Labor Relations Authority

23 FLRA No. 82

Marine Corps Logistics Base, Barstow, California and AFGE, Local 1482, Case No. 8-CA-50418 (Decided October 16, 1986)

SUBJECT MATTER INDEX ENTRIES

Unfair Labor Practices
  Agency Violations: Interference, Restraint, Coercion
    Meetings with FLRA Agents
  Agency Violations: Otherwise Refuse to Comply with the Statute
    7104(f)(2)(A)
    7131(c)
  Discipline
    Abuse of Official Time
    Meeting with FLRA Agents
    Union Official
  Investigations of Unfair Labor Practices
    FLRA General Counsel's Authority
      Conduct of an Investigation
  Official Time
    Meeting with FLRA Agents

STATUTE

7104(f)(2)(A)
7116(a)(1) and (8)
7118
7131(c)

DIGEST NOTES

The activity did not violate section 7116(a)(1) and (8) when it disciplined the union president after discovering his unauthorized visit to the union office where he met with a FLRA agent concerning pending unfair labor practice matters. Under section 7104(f)(2)(A), the General Counsel is empowered to determine the manner in which investigations are to be conducted, including the site of related interviews. Moreover, under section 7131(c), employees are entitled to official time for the purposes of participating in the processing of unfair labor practice charges. However such rights are not paramount to both the mission of an agency and its responsibility to monitor the activities of its work force.

Neither the union president nor the FLRA agency informed management that they would be meeting off base. Yet Authority agents had always previously notified management when they wished to talk to the union president or any other unit employee. The activity had never denied the Authority the opportunity to meet

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

with employees on official time nor penalized unit employees for meeting with Authority agents. Finally, although the union president was entitled to 75 percent official time under the parties' collective bargaining agreement, the agreement did not authorize him to conduct union representational functions at the off-base union office without prior permission from management. Considering all the facts and circumstances, the Judge found that the activity's actions of reprimanding the union president and charging him with 35 minutes AWOL were not based on his meeting with the Authority's agent but rather his actions in leaving the premises without prior permission in violation of the parties' agreement.

Federal Labor Relations Authority

23 FLRA No. 83

Dep't of the Air Force, Eielson Air Force Base, Alaska and AFGE, Case No. 9-CA-30009
(Decided October 16, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Compelling Need
    - Issue Concerning Organizational Level
- Unfair Labor Practices
  - Agency Violations
    - Refusal to Negotiate
      - Exchange and Concession Privileges for Civilians
  - Conditions of Employment
    - Adequate Living Conditions in Central Alaska
  - Remedies
    - Status Quo Ante
      - Criteria, Violation Involved
        - Bargaining Unit Employees
        - Significant Effect on Working Conditions
      - Violation Based on Agency's Failure to Negotiate
        - Substance of Decision

STATUTE

7103(a)(14)
7114(b)(2)
7116(a)(1) and (5)
7118

DIGEST NOTES

Employee patronage privileges at a base exchange in central Alaska (including a the main exchange, groceteria, gas station, and furniture store) and base concessions (including a beauty shop, barber shop, laundromat, and movie theatre) are matters concerning conditions of employment within the meaning of section 7103(a)(14). The agency granted employees these privileges originally to insure that employees maintain adequate living conditions in connection with their employment and so that the agency could maintain a sufficient and stable civilian workforce. To deny employees these privileges, which the agency sought to do, would require many employees to regularly commute distances -- for routine household necessities -- of at least 26 miles round trip, in winter conditions which are difficult and dangerous. Therefore the agency violated sections 7106(a)(1) and (5) by refusing to negotiate over the change in conditions of employment.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Contrary to the agency's contention, its denial of the privileges was not based on a compelling need. Under section 7114(b)(2), an agency is obligated to provide representatives at the level of bargaining who are authorized to negotiate and enter into agreements on all matters within the scope of negotiations. This statutory obligation cannot be obviated by an agency's internal regulations or the delegation of control over the subject matter to management officials at an organizational level other than the level of bargaining.

A *status quo ante* remedy is appropriate where management unilaterally terminated base exchange and concession privileges of civilian employees who lived and worked in a remote area of Alaska, a matter affecting conditions of employment. Where management refuses to negotiate over a change involving negotiable terms and conditions of employment, a *status quo ante* remedy is appropriate, absent special circumstances, in order not to render meaningless the mutual obligation to negotiate.

Federal Labor Relations Authority

23 FLRA No. 84

H.Q., U.S. Army Training Center and Fort Jackson, Fort Jackson, S.C. and Leroy W. Howell, An Individual, Case No. 4-CA-50066 (Decided October 21, 1986)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Grievability - Arbitrability
    Bargaining Unit Status of Grievant
  Procedure
    Forums
      Clarification of Unit Determinations
Unfair Labor Practices
  Interference
    Statement that Grievant is a Supervisor
  Procedure
    Forums
      Clarification of Unit Determinations
        Not Germane to ULP Determination

STATUTE

7103(a)(10)
7116(a)(1) and (8)
7118

DIGEST NOTES

An agency does not impede or obstruct the submission of unresolved grievances to binding arbitration or otherwise violate the Statute by maintaining a position in processing an employee's grievance that the employee is a supervisor, even if the agency later is found to have been incorrect. Consequently, the agency did not violate section 7116(a)(1) when it advised an employee that he could not file a grievance under the terms of the applicable collective bargaining agreement because he was not a bargaining unit employee. There was no evidence that any management official, by statement or act, attempted to interfere with, restrain, or coerce the employee from filing further appeals under the negotiated grievance procedure.

An arbitrator may make a factual determination regarding the bargaining unit status of a grievant in the course of deciding whether the arbitrator has jurisdiction to resolve the grievance under the negotiated grievance procedure. However, the negotiated grievance procedure and arbitration may not be used in place of a clarification of unit petition, i.e., the arbitrator

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

may not determine the bargaining unit status of an individual where the issue of status is not a collateral question of grievability but instead is the essential issue of the grievance.

Although it is appropriate in certain circumstances for an ALJ to make unit determinations within the context of an unfair labor practice proceeding, an ALJ should not determine the supervisory status of an employee where, as in this case, the status of the employee is not germane or necessary to his ULP determination.

(23 FLRA No. 79)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 29

Union

and

Case No. 0-NG-1050

KANSAS CITY DISTRICT, CORPS OF
ENGINEERS, KANSAS CITY, MISSOURI

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents issues concerning the negotiability of three Union proposals.1/

II. Union Proposal 1

ARTICLE 14

> Section 3. a. It is agreed that the Employer will utilize, to the maximum extent possible, the knowledge, skills and ability of its employees. Therefore, consideration will be first given bargaining unit employees in the filling of bargaining unit positions. The employer will not solicit applications from outside the minimum area of consideration, the Kansas City District, or call for an OPM register of candidates if three or more highly/best qualified candidates are identified within the minimum area of consideration.

1/ The Union withdrew its appeal as to one additional proposal concerning the removal of probationary employees. This proposal will not be considered further here.

> b. If the minimum area of consideration fails to yield at least three best qualified candidates or, if after consideration is given to best qualified candidates within the bargaining unit, the employer may expand the area of consideration to all the highly qualified candidates within the bargaining unit, if necessary. After consideration of the highly qualified unit employees, the employer may expand the area of consideration to other appropriate sources, if necessary. [Within this proposal, only the underscored portion is in dispute.]

A. Positions of the Parties

The Agency states that, if both sections (a) and (b) of Union Proposal 1 are considered together, the proposal is negotiable under the Authority's holding in *American Federation of Government Employees, AFL-CIO, Local 331 and Veterans Administration Hospital, Perry Point, Maryland*, 2 FLRA 427 (1980). However, the Agency contends that, because it made no allegation that section (b) of the proposal was outside the duty to bargain, the Authority should consider the negotiability of section (a) alone. It argues that section (a) of the proposal violates its right to select under section 7106(a)(2)(C) of the Statute in that it would prohibit the Agency from expanding the area of consideration or selecting from any appropriate source.

The Union contends that both sections (a) and (b) were presented to the Agency and that both sections should, therefore, be considered in determining the negotiability of Union Proposal 1. It argues that the proposal does not prevent management from expanding the area of consideration after first considering unit employees and is within the duty to bargain.

B. Analysis and Conclusion

The Authority rejects the Agency's contention that only section (a) should be considered in determining the negotiability of Union Proposal 1. Section (b) of the Union's proposal qualifies the language of section (a)--that is, section (b) provides that the Agency may expand the area of consideration to additional sources after first considering the sources described in section (a). We find that the proposal should, therefore, be read as a whole. The Agency's contention that the proposal should not be read in its entirety because it declared only section (a) of the proposal to be nonnegotiable is without merit.

We find, as conceded by the Agency, that Union Proposal 1 is to the same effect as the proposal that the Authority found to be within the duty to bargain in the VA Hospital, Perry Point case. The proposal in that case similarly would have required the agency to consider unit employees for vacant positions prior to expanding the minimum area of consideration. The Authority held that the proposal in VA Hospital, Perry Point did not violate the agency's right to make selections from any appropriate source in that it only required the agency to give consideration to, but not to select, unit employees for vacant positions. Accordingly, for the reasons set forth more fully in VA Hospital, Perry Point, Union Proposal 1 is within the duty to bargain.

III. Union Proposals 2 and 3

ARTICLE 14

[Union Proposal 2]

Section 4 - Crediting Plan.

a. The Employer will establish ad hoc committees for the purpose of establishing the levels of knowledge, skills and ability (KSAs) for each job element (crediting plan), to be used in rating and ranking applicants. The Union will be notified prior to the establishment of such committees and may recommend unit employees for membership on the committee. At a minimum, committee members must have occupied a position at a grade equivalent to the grade at which the position will be filled and must be capable of making an informed decision regarding the job elements, criteria and qualifications pertinent to the occupational field of the position.

b. The Crediting Plan will be based solely on job-related criteria and must be consistent with the major job elements in the performance standards for the position. The committee will establish four levels of rating for each job element of the Crediting Plan. These four levels will be expressed as narrative statements of the KSAs necessary to obtain a particular level. These levels are as follows:

(1) Outstanding - candidates KSAs in this element exceed expectations to such an extent that it warrants special consideration: 4 Points

(2) Superior - candidates KSAs in this element are clearly above that expected of a fully competent employee: 3 Points

(3) Satisfactory - candidates KSAs in this element are expected to be that of a fully competent employee: 2 Points

(4) Marginal - candidates KSAs in this element are weak but of some value: 1 Point

For Wage Grade positions, the Crediting Plans will have an additional section for "Basic Eligibility," listing the set of approved standard KSA elements in OPM Handbook X-118C and will describe both the 2 point (barely acceptable) and 1 point (weak but of some value), levels for each element. [Within this proposal, only the underscored portion is in dispute.]

[Union Proposal 3]

Section 5 - Candidate Evaluation.

a. The Employer will rate and rank all bargaining unit applicants prior to expanding the area of consideration and/or when two or more unit employees apply for a position to be filled. The Employer will establish a rating and ranking panel on all positions where there are three or more qualified bargaining unit applicants. The Union will be notified prior to the establishment of such a panel and may recommend unit employees for membership on the panel. At a minimum, panel members must have occupied a position at a grade equivalent to the grade at which the position will be filled and must be capable of making an informed decision regarding the job elements, criteria and qualifications relative to the crediting plan and not be a candidate for the position. All materials used by rating and ranking panels shall be sanitized of names and social security numbers.

b. The candidate evaluation will consist of two parts. The first part will be the supervisor's appraisal which will consist of a "Task Level Questionnaire", in which the supervisor will identify one of the four narrative levels of each job element, which closest describes the candidates demonstrated knowledge, skill or ability. The second part of the candidate evaluation will be the candidate's questionnaire, in which the candidate will provide a narrative description of his/her knowledge, skills, or ability for each job element. The candidate's questionnaire will then be compared against the crediting plan for his/her rating on each job element. A mathematical average will be computed for the supervisor's questionnaire (SQ), and the candidate's questionnaire (CQ); each will then be placed in the following formula to arrive at the candidate's overall rating, ((SQ x .25) + (CQ x .75)) x 25 = Overall rating. To the overall rating points will be added, as follows:

DEGREE		POINTS
PhD	=	10
MS or MA	=	7
BS or BA	=	5
Associate Degrees	=	2
12-60 Credit Hours	=	1

PERFORMANCE RATING		POINTS
Exceptional	=	3
Highly Successful	=	2
Fully Successful	=	1

> Candidates and their ratings will be listed on the Selection and Referral List in numerical order, with the highest rated candidate first and lowest rated candidate last. In cases where two or more candidates have the same numerical rating, the service computation date will be used as a tie-break with the most senior listed first. [Within this proposal, only the underscored portion is in dispute.]

A. *Positions of the Parties*

The Agency contends that Union Proposals 2 and 3 would require it to negotiate concerning the content of crediting plans in violation of its rights under section 7106(a)(2)(B) and (C) of the Statute to determine the personnel by which agency operations will be performed and to make selections for appointments. The Agency also incorporates arguments made by the Office of Personnel Management (OPM) concerning the Authority's decision in *National Treasury Employees Union and NTEU Chapters 153, 161 and 183 and U.S. Customs Service, Region II*, 11 FLRA 209 (1983), *enforcement denied sub nom. U.S. Customs Service, Region II v. Federal Labor Relations Authority*, 739 F.2d 829 (2d Cir. 1984). OPM contends that bargaining over the content of crediting plans (1) violates management's rights to select, assign work, and determine the personnel by which agency operations will be conducted; and (2) is inconsistent with various laws and Government-wide regulations, including 5 C.F.R. § 335.103 and Federal Personnel Manual (FPM) Supplement 335-1.

The Union contends that Proposals 2 and 3 can be distinguished from the proposals in *U.S. Customs Service, Region II*. It argues that the proposals in that case specifically defined the evaluation criteria and measurement tools by which candidates would be ranked but that the proposals in dispute here leave those determinations to a management-appointed committee. The Union argues that subsection (b) of Proposal 2 here merely states the number of rating levels to be applied in judging candidates based on the knowledge, skills, abilities and other factors (KSAOs) which the committee has determined to be relevant. The Union claims, therefore, that Proposal 2 reserves greater authority to the Agency than the proposals in *U.S. Customs Service, Region II*. It further argues that subsection (b) of Proposal 3 is also distinguishable from the proposals in that case because the proposal leaves the bulk of the overall rating to the committee's assessment of a candidate's KSAOs and a supervisory evaluation--both management determinations.

It also argues that subsection (a) of Proposal 3 is not concerned with the content of the Agency's crediting plan at all, and does not prevent management from expanding the area of consideration or selecting a candidate from any other appropriate source. Also, the Union disputes the arguments contained in the OPM statement.

B. Analysis and Conclusions

Union Proposals 2 and 3 concern the process by which the Agency evaluates candidates for positions--that is, the Agency's "crediting plan." In The Montana Air Chapter of Association of Civilian Technicians and U.S. Department of the Air Force, Montana Air National Guard, 19 FLRA No. 112 (1985), the Authority adopted the decision of the United States Court of Appeals for the District of Columbia Circuit in Department of the Treasury, U.S. Customs Service v. Federal Labor Relations Authority, 762 F.2d 1119 (D.C. Cir. 1985) and held that a proposal which assigned points for crediting plan purposes solely on the basis of seniority was inconsistent with 5 C.F.R. § 300.103(a).2/ The Authority found that section 300.103(a) required that crediting plans, like other employment practices, be derived from a job analysis, and that the union had not demonstrated that any job analysis had been conducted which linked seniority to success in the particular position(s) in question.

The Union contends that Proposals 2 and 3 in dispute here are different than the type of proposals in Montana Air National Guard because its proposals allow the Agency to

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2/ 5 C.F.R. § 300.103(a) reads in pertinent part:

> § 300.103 Basic Requirements
>
> (a) Job analysis. Each employment practice of the Federal Government generally, and of individual agencies, shall be based on a job analysis to identify:
> (1) The basic duties and responsibilities;
> (2) The knowledges, skills, and abilities required to perform the duties and responsibilities; and
> (3) The factors that are important in evaluating candidates. The job analysis may cover a single position or group of positions, or an occupation or group of occupations, having common characteristics.

determine the KSAOs relevant to the position. However, while the proposals in dispute here do not define the applicable KSAOs, they do set forth how much weight those KSAOs are to be given in evaluating candidates. For example, subsection (b) of Proposal 2 would apply the same point scale to each KSAO--that is, under the proposal, each of the KSAOs is presumed to be of equal value in evaluating the candidate under the crediting plan. Additionally, subsection (b) of Proposal 3 would establish the respective weights to be given to the supervisory evaluation and the candidates' responses, and would add additional points to a candidates' overall rating based upon education and performance ratings. Contrary to the Union's contentions, these provisions are not procedures but instead concern the substantive aspects of the Agency's crediting plan.

As to subsection (b) of Proposal 2, nothing in the Union's submissions would indicate that its proposed assignment of equal weight to all KSAOs is in any way derived from a job analysis. Additionally, the Union has not demonstrated that subsection (b) of Proposal 3 is based on a job analysis which shows a connection between performance in a current position or degrees held by a candidate and success in the position(s) for which candidates are applying. See National Association of Government Employees, Local R7-23 and Department of the Air Force, Headquarters 375th Air Base Group (MAC), Scott Air Force Base, Illinois, 21 FLRA No. 115 (1986). Accordingly, for the reasons set forth in the Montana Air National Guard decision, subsection (b) of Proposal 2 and subsection (b) of Proposal 3 are inconsistent with 5 C.F.R. § 300.103(a) and are outside the duty to bargain under section 7117(a)(1) of the Statute. In view of this decision, it is unnecessary for us to decide whether those sections also violate management's rights or are inconsistent with the laws and regulations cited by OPM.

The Agency, in its Statement of Position, does not state any specific objection to subsection (a) of Union Proposal 3. Rather, the Agency makes only general objections concerning the content of crediting plans. Subsection (a) of Proposal 3, however, is not concerned with the content of the Agency's crediting plan. Instead, subsection (a) discussed above, would require the Agency to (1) rate and rank bargaining unit applicants prior to expanding the area of consideration for a position and (2) use a panel for the rating and ranking process where there are three or more qualified bargaining unit applicants. The Union states that its proposal is not intended to require the Agency to select a unit employee and does not preclude the Agency from expanding the area of consideration. Union Response at 3-4, 10. We agree with the

Union's interpretation and find that, like Union Proposal 1, subsection (a) of Proposal 3 constitutes a procedure which does not directly interfere with the Agency's rights. Additionally, because subsection (a) is not concerned with the content of the Agency's crediting plan, we find that the arguments raised in the OPM statement are inapplicable. Accordingly, we conclude that subsection (a) of Union Proposal 3 is within the duty to bargain.

IV. Order

Pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request, or as otherwise agreed to by the parties, bargain concerning Union Proposal 1 and subsection (a) of Union Proposal 3.[3] IT IS FURTHER ORDERED that the Union's petition for review as to Union Proposal 2 and as to subsection (b) of Union Proposal 3 be, and it hereby is, dismissed.

Issued, Washington, D.C., October 14, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[3] In finding these proposals within the duty to bargain, the Authority makes no judgment as to their merits.

23 FLRA No. 80

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE ARMY
DUGWAY PROVING GROUND
DUGWAY, UTAH

Respondent

and

Case No. 7-CA-50559

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R14-62

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority based on the Regional Director's "Order Transferring Case to the Authority" in accordance with section 2429.1(a) of the Authority's Rules and Regulations. The complaint alleged that the Respondent refused to bargain over a change in the established practice with regard to the assignment of government-owned, on-post, non-housekeeping quarters to "geographical bachelors" in violation of section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute).

II. Background

The National Association of Government Employees, Local R14-62, (Charging Party), is the exclusive representative of the Respondent's professional employees. It represents approximately 75 of the Respondent's 747 civilian employees.

The Respondent, Dugway Proving Ground (DPG), is a remote installation located approximately 45 miles from the nearest community, Tooele, Utah, where limited housing is available. To reach this community requires more than an hour commute over a mountain pass which is either impassable or extremely hazardous during winter storms. DPG is 80 miles from Salt Lake City, Utah, where a wide variety of housing is available. There is no housing other than government housing at DPG. Due to this remote location and the lack of locally-available housing, 250 family quarters were constructed, and it was required that certain of those quarters be provided to civilian employees. Other quarters were constructed for the use of transient and permanent civilian and military personnel.

Civilian employees at DPG fall into three categories for assignment of government housing: (1) married civilians with families who are eligible for family quarters; (2) "bona fide bachelors" (i.e., unmarried civilian employees) who are provided non-housekeeping quarters if available; and (3) "geographical bachelors" (i.e., civilian employees with dependents who are eligible for family quarters and may or may not be on the waiting list for such quarters, and who live on DPG but maintain and commute on weekends to and from a primary residence outside DPG). The third group and the practice that developed regarding their housing is the subject of the present case.

On May 9, 1975, DPG issued DPG Regulation 210-7, establishing priorities for assignment of non-housekeeping quarters (private room quarters where housekeeping services are not provided) to military and civilian personnel. Since at least the issuance of that regulation, geographical bachelors have been provided, upon request, with, at a minimum, the single occupancy non-housekeeping quarters, thereby permitting such employees to reside on DPG during the workweek and commute to their primary residence outside DPG on weekends. Since 1980 these employees have been permitted to work a Monday through Thursday schedule (10 hours per day).

The initial assignment to non-housekeeping quarters is made by DPG on an "as available" basis. Under DPG Regulation 210-7, bona fide bachelors have a higher priority for assignment of non-housekeeping quarters than geographical bachelors. However, once assigned to such quarters, the geographical bachelors were not required to vacate the quarters when new bona fide bachelor employees arrived at the base. This practice initially developed during a period when DPG had excess non-housekeeping quarters. This excess no longer existed by January, 1985.

On May 20, 1985, the Commanding Officer informed the three unions with bargaining unit employees at DPG, including the Charging Party, that it might be necessary to evict some of the geographical bachelors in order to provide space for the bona fide bachelors. At that time there were 48 geographical bachelors, 10 of whom are part of the Charging Party's bargaining unit. The Commanding Officer followed this up with a letter to the geographical bachelors evicting them from the non-housekeeping quarters. This action resulted in the filing of an unfair labor practice charge that was withdrawn after the Commanding Officer offered to suspend the eviction action pending review of the matter by an ad hoc committee and to include union representatives on the committee. The parties stipulated that the Charging Party's membership on the committee did not constitute a waiver of its right to bargain over the proposed change in quarters policy, and that collective bargaining, as defined by the Statute, did not occur at the meetings.

A majority of the Ad Hoc committee recommended that dual occupancy dormitory rooms in another building be offered to the geographical bachelors which would permit their relocation from the single occupancy, non-housekeeping quarters and use of those quarters by bona fide bachelors. The Charging Party filed a Minority Opinion with the Commanding Officer suggesting alternate methods of handling the problem. The Commanding Officer essentially adopted the majority's recommendations.

The Commanding Officer informed the Charging Party of his decision to evict the geographical bachelors on August 5, 1985. On August 6, 1985, the Charging Party requested to bargain over the Commanding Officer's decision and submitted an initial proposal to maintain the status quo. On the same date, the Commanding Officer issued letters to all the geographical bachelors, including those represented by the Charging Party. The letter required geographical bachelors to vacate their quarters and offered dormitory rooms at a higher cost. On the next day, August 7, 1985, DPG responded to the Charging Party's request to bargain, stating, "It is the position of this agency that we have negotiated this issue in question in accordance with applicable statutes to the limits of our authority. We will have to request a determination on the negotiability of the regulation through our chain of command to Headquarters, Department of Army."1/ No further discussion took place between the parties. The geographical bachelors were evicted on or about August 23, 1985.

1/ The Respondent was referring to Army Regulation (AR) 210-11, Billeting Operations, which provided for quarters assignment priorities. For purposes of this case, the Respondent is not asserting that a compelling need exists for this regulation. Also, as noted previously, Respondent stipulated that (1) the Charging Party's membership on the Ad Hoc committee did not waive any right to bargain over the changes, and (2) collective bargaining did not occur at the committee meetings.

Of 847 Department of Army civilian employees, 437 occupy DPG family housing, bachelor officer quarters, or dormitories. Over 400 employees commute on a daily basis. As stipulated by the parties, the relative isolation of DPG and the lack of available housing has resulted in a significant impact on civilian employee recruitment and retention and has placed DPG at a competitive disadvantage with Tooele Army Depot where limited facilities are available. Therefore, the possible availability of housing at DPG is used as a recruitment inducement.

III. Positions of the Parties

The Respondent argues that offering surplus quarters to geographical bachelors was never considered a condition of employment. The Respondent noted the Authority's finding in United States Department of Justice, United States Immigration and Naturalization Service, 14 FLRA 578 (1984), that the assignment of government-owned housing, in the circumstances of that case, was a condition of employment. However, the Respondent contends that none of the criteria applied by the Authority in that case were applicable to the geographical bachelors at DPG. The Respondent notes that DPG has never been declared a hardship station and that none of the employees are assigned to serve there as in the cited case. The Respondent also claims that while there is no housing other than government-owned in the immediate area, there must be adequate housing in the commuting area because the majority of the DPG employees commute to work. The Respondent also argues that it cannot be fairly said that the housing at DPG was constructed for the benefit and use of civilian employees because military personnel would have priority if the mission required an increase in their numbers. Finally, the Respondent alleges that while the Commanding Officer exercised his discretion in making the quarters available to geographical bachelors, he was not delegated the responsibility to make assignments under regulation as in United States Department of Justice, United States Immigration and Naturalization Service.

The General Counsel contends that a past practice of assigning geographical bachelors in the unit to non-housekeeping quarters existed, and that this practice is a condition of employment. The General Counsel notes that since 1975 these geographical bachelors have been provided with quarters during their normal workweek, and that they have not been required to vacate these quarters when employees with higher priority arrived at the facility. The

General Counsel notes that the Respondent acknowledged this practice in its regulatory scheme and has consistently followed it for the ten year period preceding the change on August 23, 1985.

The General Counsel argues further that the practice is a matter affecting conditions of employment because it was integrally involved with the employment of unit employees. The General Counsel claims that it meets the test applied by the Authority in previous cases for the following reasons: DPG is a remote location; the assignment of housing is directly related to the facility's recruitment and retention program; and, the policy was a direct outcome of the Commander's local discretion.

Therefore, the General Counsel contends that the unilateral change in the policy, which is both an established practice and a condition of employment, violated section 7116(a)(1) and (5) of the Statute. Finally, the General Counsel submits that a status quo ante order with backpay to make whole employees who were required to reside in higher cost quarters and/or commute on a daily basis as a consequence of the Respondent's unlawful conduct is the only appropriate remedy.

IV. Analysis

A. Was there an Established Past Practice of Assigning Government-Owned, On-Post, Non-Housekeeping Quarters to Geographical Bachelors?

Since 1975, as set forth in the Respondent's regulations (DPG 210-7), the priority for assignment of non-housekeeping quarters has included geographical bachelors, and the record reflects that geographical bachelors resided in these quarters until their eviction on August 23, 1985. The Authority concludes, based on the facts set out above, which are not disputed by the Respondent, that the assignment of non-housekeeping quarters to the category of employees referred to as geographical bachelors constituted an established practice at DPG.

B. Is the Past Practice of Assigning Government-Owned, On-Post, Non-Housekeeping Quarters to Geographical Bachelors a Condition of Employment?

The Authority concludes for the reasons set forth below that the assignment of non-housekeeping quarters to geographic bachelors is a condition of employment within the meaning of section 7103(a)(14) of the Statute. In our recent decision, Antilles Consolidated Education Association and Antilles Consolidated School System, 22 FLRA No. 23 (1986), we described two basic considerations in deciding whether a particular proposal involved a condition of employment: (1) whether the matter proposed to be bargained pertains to bargaining unit employees; and (2) the nature and extent of the effect of the matter proposed to be bargained on working conditions of those employees. As to the second consideration, there must be a direct connection between the proposal and the work situation or employment relationship of bargaining unit employees.

As to the first consideration, in this case it is undisputed that the practice of assigning non-housekeeping quarters to geographical bachelors involved bargaining unit employees. Moreover, any bargaining unit employee meeting the definition of geographical bachelor was eligible. Therefore, the established past practice pertains to bargaining unit employees.

With respect to the second consideration, we conclude that the General Counsel has established a direct connection between the practice of assigning non-housekeeping quarters to geographical bachelors and their work situation or employment relationship. The parties stipulated that government housing was constructed with the proviso that a portion be set aside for civilian use because of the remote location of DPG. The relative isolation and lack of available housing resulted in a significant impact on civilian employee recruitment and retention, and the potential availability of housing was used as a recruitment inducement. Further, there was a financial benefit to residing in on-post housing because those employees had reduced daily commuting costs. Moreover, there is a connection between hours of work and geographical bachelors' assignment to the housing because the geographical bachelors were permitted to work a four day week (ten hours per day) which increased the amount of time spent with their families.

In sum, the practice of assigning non-housekeeping quarters to geographical bachelors pertains to bargaining unit employees and has a direct effect on the working conditions of those employees. The practice constitutes a condition of employment of bargaining unit employees.

V. Conclusion

Having concluded that the practice of assigning government-owned, on-post, non-housekeeping quarters to geographical bachelors is a condition of employment, the

Authority finds that Respondent's failure to bargain upon request with the Charging Party over its change constitutes a failure to bargain in good faith in violation of section 7116(a)(1) and (5) of the Statute.

VI. Remedy

As noted above, the General Counsel requested, in addition to a cease and desist order, both *status quo ante* relief and a make whole order to reimburse those unit employees unlawfully affected by the eviction. We conclude that *status quo ante* relief, limited to reinstitution of the practice of assigning single occupancy, non-housekeeping quarters to geographical bachelors, as supplemented by an order requiring the parties to negotiate and give retroactive effect to any agreement reached, will best effectuate the purposes and policies of the Statute.2/

In carrying out its statutory functions, the Authority has wide discretion to fashion remedies under section 7105(g)(3) and section 7118(a)(7) of the Statute.3/ In this case, the General Counsel requests a *status quo ante* remedy that would require the eviction of any bona fide bachelor who replaced an evicted geographical bachelor. Such a requirement would have an obvious disruptive effect on the agency's operations as well as on the employees involved. Further, the Respondent offered all of the evicted geographical bachelors alternative housing at DPG so none were actually foreclosed from continuing on the same work schedule. In view of these facts, we conclude that displacement of any bona fide bachelor residing in the disputed quarters is unwarranted.

2/ Reinstitution of the practice shall include making available to the evicted unit geographical bachelors any vacant equivalent quarters.

3/ *See*, *for example*, the discussion in footnote 4 of *Veterans Administration, Washington, D.C. and Veterans Administration Medical Center and Regional Office Center, Fargo, North Dakota*, 22 FLRA No. 64 (1986).

While not ordering eviction of the bona fide bachelors to make room for geographical bachelors, we view as appropriate that affected employees be made whole for increased expenses resulting from the Respondent's improper action. In our view, a determination of these expenses can best be made by ordering the Respondent, upon request, to negotiate with the Union with respect to the change in conditions of employment involved in this case. Thereafter, Respondent shall make whole affected employees for their increased expenses suffered as a result of their eviction, consistent with applicable law and taking into account the agreement resulting from the negotiations we are ordering, applied retroactive to the date of the eviction.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, it is ordered that the Department of the Army, Dugway Proving Ground, Dugway, Utah, shall:

1. Cease and desist from:

(a) Refusing to negotiate with the National Association of Government Employees, Local R14-62, the exclusive representative of certain of its employees, concerning a change in the practice of assigning government-owned, on-post, non-housekeeping quarters to geographical bachelors in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Reinstate the past practice of assigning government-owned, on-post, single occupancy, non-housekeeping quarters to geographical bachelors.

(b) Make available to the evicted bargaining unit geographical bachelors any equivalent vacant non-housekeeping quarters.

(c) Negotiate, upon request, over the change in conditions of employment which resulted in the unlawful eviction of bargaining unit geographical bachelors, and make them whole for their increased expenses suffered as a result of their eviction, consistent with applicable law and taking into account the agreement resulting from the negotiations the Authority is ordering, applied retroactive to the date of the eviction.

(d) Negotiate in good faith, upon request, over any proposed change in the practice of assigning government-owned, on-post, non-housekeeping quarters to geographical bachelors in the bargaining unit represented exclusively by the National Association of Government Employees, Local R14-62.

(e) Post at Dugway Proving Ground, Dugway, Utah, in all facilities where bargaining unit employees are located, copies of the attached notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer, or a designee, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(f) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with it.

Issued, Washington, D.C., October 14, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to negotiate with the National Association of Government Employees, Local R14-62, the exclusive representative of certain of our employees, concerning a change in the practice of assigning government-owned, on-post, non-housekeeping quarters to geographical bachelors in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL reinstate the past practice of assigning government-owned, on-post, single occupancy, non-housekeeping quarters to geographical bachelors.

WE WILL make available to the evicted bargaining unit geographical bachelors any equivalent vacant non-housekeeping quarters.

WE WILL negotiate, upon request, over the change in conditions of employment which resulted in the unlawful eviction of bargaining unit geographical bachelors and, make them whole for their increased expenses suffered as a result of their eviction, consistent with applicable law and taking into account the agreement resulting from the negotiations the Authority is ordering, applied retroactive to the date of the eviction.

WE WILL negotiate in good faith, upon request, over any proposed change in the practice of assigning government-owned, on-post, non-housekeeping quarters to geographical bachelors in the bargaining unit represented exclusively by the National Association of Government Employees, Local R14-62.

____
(Activity)

Dated:__________________ By:_______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VII, whose address is: 535 16th Street, Suite 310, Denver, Colorado 80202 and whose telephone number is: (303) 837-5224.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FRANKLIN LODGE NO. 2135
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO

Union

and

Case No. 0-AR-1101

BUREAU OF ENGRAVING AND PRINTING
U.S. DEPARTMENT OF THE TREASURY

Agency

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Fred Blackwell filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition.1/

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance in this case arose as a result of a year-end shutdown at the Agency. During the period of the shutdown, employees were given the option of requesting annual leave or leave without pay, of scheduling sick leave, if appropriate, or of being furloughed, a nonpay status. The grievant, a prevailing rate employee under 5 U.S.C. § 5349, did not exercise any leave option and was furloughed for the day of Monday, December 31, 1984. He was in a holiday pay status on Tuesday, January 1, 1985, and a regular pay status for the following regularly scheduled workdays of Wednesday,

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1/ In its opposition the Union contends that the Agency's exception was untimely. However, the Authority has determined that under section 2425.1(b) and 2429.22 of the Authority's Rules and Regulations, the Agency's exception was timely filed.

Thursday, and Friday. On January 2, the Agency posted a work schedule for Saturday, January 5, which included the grievant. The grievant and other employees who had been in a furlough status on December 31 were advised that to receive overtime pay for Saturday, they had to change their status on Monday, December 31, from furlough to annual leave in order that their Saturday work would be in excess of 40 hours of work in an administrative workweek. The procedures governing Saturday work also provided an employee the option of removing his or her name from the assignment list. The grievant did not change his furlough status of December 31. He also did not remove his name from the Saturday schedule and instead worked 8 hours on Saturday, January 5. When he was compensated at straight-time rates, he filed a grievance which was submitted to arbitration claiming that the Agency's refusal to pay him at the overtime rate for the 8 hours of Saturday work violated Article 6, section 6 of the parties' collective bargaining agreement. Article 6, section 6 provides that "[a]ll work performed on Saturday or Sunday will be paid at overtime rates."

The Arbitrator generally agreed with the Agency that Article 6, section 6 could not be applied without reference to other provisions of the agreement and to applicable law and regulation governing the payment of overtime pay. Nevertheless, he determined that in this case the Agency had violated the agreement. He found that in view of the grievant's furlough, the Agency was obligated to have omitted the grievant from the Saturday work schedule and that the failure to take such action constituted a mishandling of the grievant's rights in violation of Article 6, section 6. He further found that this mishandling was not offset by the grievant choosing not to remove his name from the Saturday work schedule and not convert his furlough status of December 31 to annual leave. The Arbitrator therefore ruled that in these circumstances the grievant's Saturday work on January 5 constituted overtime work under the provisions of Article 6, section 6. Accordingly, as his award, the Arbitrator sustained the grievance and directed the Agency to pay the grievant at the overtime rate for the work performed on Saturday, January 5, 1985.

III. EXCEPTION

In its exception the Agency primarily contends that the award of overtime pay to the grievant is contrary to applicable law and regulation governing the payment of overtime pay to prevailing rate employees. The Agency argues that under governing law and regulation, the grievant could be paid overtime pay only if his hours of work, counting his work hours on Saturday, January 5, exceeded 40 hours in the administrative workweek. The Agency maintains that under 5 CFR § 532.503, all regularly scheduled workdays during which an employee is in a nonpay status are not considered hours of work in determining whether the employee is entitled to overtime pay for work performed in excess of 40 hours in the week. Thus, the Agency asserts that the grievant's work on Saturday did not exceed 40 hours in the workweek and that consequently the Arbitrator's enforcement of the parties' collective bargaining agreement to compel payment of overtime pay for such work is deficient.

IV. ANALYSIS AND CONCLUSIONS

We agree with the Agency. Employees, as the grievant in this case, whose pay is fixed and adjusted in accordance with prevailing rates under 5 U.S.C. § 5349, are entitled to overtime pay pursuant to 5 U.S.C § 5544 and 5 CFR part 532, subpart E. As relevant to this case, an employee is entitled to overtime pay for hours of work in excess of 40 hours in a week. In determining whether an employee is entitled to overtime pay for work performed in excess of 40 hours in a week, 5 CFR § 532.503(b)(3) provides as follows:

> Hours during which an employee is absent from duty on leave without pay during a time when he/she otherwise would have been required to be on duty shall not be considered hours of work in determining whether he/she is entitled to overtime pay for work performed in excess of eight hours in a day or 40 hours in a week.

In view of this provision, we similarly find that all hours of a regularly scheduled workday during which an employee is in a nonpay status, such as on furlough, are not to be considered hours of work in determining whether the employee is entitled to overtime pay for work performed in excess of 40 hours in a week. In terms of this case, Monday, December 31, 1984, cannot be considered in determining whether the grievant was entitled to overtime pay for work performed in excess of 40 hours in the workweek in dispute because he was in a nonpay status on that day as a result of having been furloughed. Thus, by working 8 hours on Saturday, January 5, 1985, the hours of work of the grievant only equaled rather than exceeded 40 hours in the disputed workweek. Thus, under 5 U.S.C. § 5544 and 5 CFR part 532, subpart E, payment of overtime pay to the grievant for the hours of work on Saturday, January 5 was precluded by law and regulation.[2/]

Accordingly, the Arbitrator's award of overtime pay to the grievant for the hours of work on Saturday, January 5, 1985, is deficient as contrary to 5 U.S.C. § 5544 and 5 CFR part 532, subpart E. Although the Arbitrator could properly determine that the Activity had violated Article 6, section 6, he could not properly enforce that provision in fashioning a remedy for the violation to direct the payment of overtime pay to the grievant when not authorized by law. See, for example, Social Security Administration and American Federation of Government Employees, AFL-CIO, 16 FLRA 552 (1984) (holding that while an arbitrator could properly find that an agency's denial of a within-grade increase was in violation of the parties' agreement, he could not properly fashion a remedy which was contrary to applicable law). Furthermore, the payment of overtime pay is not authorized as an award of backpay under the Back Pay Act, 5 U.S.C. § 5596, because there is no unwarranted action that directly resulted in the grievant not working overtime and receiving overtime pay when he otherwise would have done so.

[2/] Prevailing rate employees who are nonexempt under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq., are also eligible for overtime pay under the provisions of FLSA as implemented for Federal employees in 5 CFR part 551 and are entitled to be paid overtime pay under the provisions which provide them the greater overtime benefit. 5 CFR § 532.503(a)(1). It is uncertain whether the grievant is a nonexempt employee under FLSA. However, assuming that he is nonexempt, payment of overtime pay to the grievant for the hours of work on Saturday, January 5 was likewise precluded under FLSA. Employees who are not exempt are entitled to overtime pay for all hours of work in excess of 40 hours in a workweek. 5 CFR § 551.501. However, paid periods of nonwork for holidays are not considered hours of work under FLSA. 5 CFR § 551.401(b). Consequently, with the paid holiday of January 1, 1985, included in the disputed workweek, payment of overtime pay to the grievant was precluded under FLSA and implementing regulations regardless of the Arbitrator's view of the Activity's treatment of the grievant in relation to Monday, December 31.

V. DECISION

For these reasons, the Arbitrator's award is modified to strike the direction to pay the grievant the overtime rate for his work on Saturday, January 5, 1985.[3]

Issued, Washington, D.C. October 16, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[3] In view of this decision, it is not necessary that the Authority address the other contentions of the Agency in its exception.

23 FLRA No. 82

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

MARINE CORPS LOGISTICS BASE
BARSTOW, CALIFORNIA

Respondent

and

Case No. 8-CA-50418

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, LOCAL
1482, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the Charging Party filed exceptions to the Judge's Decision, and the Respondent filed an opposition to the exceptions.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's decision and the entire record, the Authority hereby adopts the Judge's findings,1/ conclusions, and recommendation that the complaint be dismissed.

1/ The Charging Party excepted to certain credibility findings made by the Judge. The demeanor of witnesses is a factor of consequence in resolving issues of credibility, and the Judge observed the witnesses while they testified. The Authority will not overrule a Judge's resolution with respect to credibility unless a clear preponderance of all the relevant evidence demonstrates that such resolution was incorrect. The Authority has examined the record carefully, and finds no basis for reversing the Judge's credibility findings.

In agreement with the Judge, we specifically find that the reprimand and 35 minutes AWOL charged to the employee were not based on the Union President's activity in meeting with an Authority agent, but rather on his actions in leaving the premises without prior permission in violation of the Respondent's interpretation of the collective-bargaining agreement. Therefore, we conclude, in agreement with the Judge, that the Respondent did not violate the Statute as alleged in the complaint. Accordingly, we shall dismiss the complaint.

ORDER

IT IS ORDERED that the complaint in Case No. 8-CA-50418 be, and it hereby is, dismissed in its entirety.

Issued, Washington, D.C., October 16, 1986.

L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(23 FLRA No. 82)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

MARINE CORPS LOGISTICS BASE
BARSTOW, CALIFORNIA

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, LOCAL
1482, AFL-CIO

Charging Party

Case No.: 8-CA-50418

Jonathan S. Levine, Esquire
For the General Counsel

William M. Petty, Esquire
Major Charles Dorman
For the Respondent

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. 7101, et seq. and the Rules and Regulations issued thereunder.

Pursuant to an amended charge first filed on July 11, 1985, by the American Federation of Government Employees, Local 1482, AFL-CIO, (hereinafter called the Union or Local 1482), a Complaint and Notice of Hearing was issued on October 31, 1985 by the Regional Director for Region VIII, Federal Labor Relations Authority, Los Angeles, California. The Complaint alleges that the Marine Corps Logistics Base, Barstow, California, (hereinafter called the Respondent), violated Sections 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by issuing a letter of reprimand to Mr. Dale Boyce and charging him with thirty-five minutes of AWOL for meeting during official hours with an agent of the Federal Labor Relations Authority for purposes of providing evidence in a pending unfair labor practice proceeding.

A hearing was held in the captioned matter on December 18, 1985, in Los Angeles, California. All parties were afforded the opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted briefs on January 31 and 29, 1986, respectively, which have been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The American Federation of Government Employees, (hereinafter called the AFGE), was certified on October 12, 1982, "as the exclusive representative in a national consolidated unit of the United States Marine Corps., Washington, D.C., which includes" the graded and ungraded employees of the Respondent's Barstow, California installation. Local 1482, the charging party, is the AFGE local representative at Barstow.

The AFGE and the Respondent are parties to a master collective bargaining labor agreement which became effective April 27, 1985, and which provides in Article 8, Section 3, that the Local Union President at Barstow will be entitled to 75% official time to perform representational functions. The contract further provides in Article 8, Section 4 as follows:

> Stewards and local officers appointed to represent unit employees will represent employees at the activity as designated. Official time will be approved only for representational functions performed at the activity where the representative is employed except:

> (a) to attend hearings before the FLRA, MSPB, or an arbitrator concerning a dispute involving employees of the activity where the representative is employed; or
>
> (b) when representation off the work premises by the individual has been approved, in writing, by the commanding officers of the activities involved.

With respect to Article 8, Section 4, the record establishes that the Respondent has interpreted this provision as prohibiting the Union President to utilize official time for purposes of conducting representational functions at the union hall located off the base in Barstow, California. The record further establishes that Union President Dale Boyce had been informed of the Respondent's interpretation of Article 8, Section 4, prior to the events underlying the instant complaint.

On May 28, 1985, Union President Dale Boyce was informed by the union secretary located in the off-base Barstow, California union office that Ms. Linda Gonzalez, (hereinafter referred to as Ms. L. Gonzalez), an agent of the Federal Labor Relations Authority, had called and wanted him (Mr. Boyce) to call her the next day at the Respondent's Civilian Personnel Office (CPO) at 12:30 p.m.1/ Inasmuch as Mr. Boyce was scheduled to meet with Respondent's representatives the next morning at the Civilian Personnel Office he decided to personally meet there with Ms. L. Gonzalez rather than telephone her.

1/ Ms. L. Gonzalez had made an appointment to meet Mr. Rick Schultz, Labor Relations Specialist and Ms. Esther Gonzales, Supervisory Labor Relations Specialist around 12 p.m. on May 29, 1985 in connection with pending unfair labor practice charges that she was investigating. Both Mr. Schultz and Ms. Gonzales testified that Ms. L. Gonzalez prior to her arrival at the Barstow CPO never informed them of her intention or desire to meet with Mr. Boyce. Ms. L. Gonzalez did not testify at the hearing.

On May 29, 1985, Mr. Boyce reported for work at 7 a.m.[2] After working for two hours, Mr. Boyce approached Mr. Kenneth Graham, supervisor of the welding shop, and requested six hours of official time to perform various representational duties. According to Mr. Boyce, after telling Mr. Graham what union business he would be working on the rest of the day and where he could be found he left his work site for the remainder of the day. Further, according to Mr. Boyce he did not tell Mr. Graham that he was meeting with Ms. L. Gonzalez later in the afternoon. He could not swear to it, but he might have mentioned that he "was going to see Linda Gonzalez at CPO".

After departing from his work station Mr. Boyce met with various management representatives, including Supervisory Labor Relations Specialist Esther Gonzales. During the course of the meeting with Ms. Gonzales, Mr. Boyce mentioned, according to Ms. Gonzales, that he was going to talk to Ms. L. Gonzalez to which Ms. Gonzales replied that she had an appointment with her around noontime. According to Ms. Gonzales there was no discussion of what Mr. Boyce and Ms. L. Gonzalez were to talk about. Finally, Ms. Gonzales testified, without contraction, that Mr. Boyce never told her that he was going to have a meeting with Ms. L. Gonzalez.

Around noon Ms. L. Gonzalez arrived at the CPO for her scheduled meeting with Ms. Esther Gonzales. Prior to starting the scheduled meeting Ms. L. Gonzalez met and spoke to Mr. Boyce out in the hall about certain unfair labor practices she was investigating. Inasmuch as Mr. Boyce's files were in the off-base union office in Barstow, they agreed to meet there after Ms. L. Gonzalez finished her business with the Activity representatives. Ms. L. Gonzalez estimated that the meeting would last approximately one to two hours. At Mr. Boyce's suggestion, it was agreed that Ms. L. Gonzalez would call him at the union hall when she finished her business with the Activity officials. Ms. Esther Gonzales acknowledges that she observed Mr. Boyce and Ms. L. Gonzalez talking.

Ms. L. Gonzalez then proceeded with her scheduled meeting with Activity representatives Ms. Esther Gonzales

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2/ Mr. Boyce's work hours are from 7 a.m. to 3:30 p.m.

and Mr. Rick Schultz. During the course of the meeting Ms. L. Gonzalez informed Mr. Schultz and Ms. Esther Gonzales that if she had time she would like to meet with Mr. Boyce. When the meeting concluded at approximately 3 p.m. Ms. L. Gonzalez asked Ms. Esther Gonzales for a telephone number where she could contact Mr. Boyce. When Ms. Gonzales replied "Do you want the union office in the Repair Division", Ms. L. Gonzalez responded that she wanted the off-premises union office in Barstow.

Ms. L. Gonzalez then telephoned Mr. Boyce at the Barstow union office, informed him that her meeting with the Activity representatives was over, and that she was on her way. Ms. L. Gonzalez then told the Activity representatives that she was going to the union office in Barstow to talk to Mr. Boyce and departed the CPO. The union office in Barstow is approximately a 15 minute ride from the CPO.

Prior to departing the CPO Ms. L. Gonzalez did not tell the Activity representatives the specific reason that she was meeting with Mr. Boyce. Upon arriving at the union office, Ms. L. Gonzalez proceeded to discuss certain pending unfair labor charges with Mr. Boyce.

At no time did Mr. Boyce inform management that he was leaving the installation to go to the union office in Barstow. Similarly, at no time did he tell management of his scheduled appointment with the Authority representative at the union office in Barstow.

On June 4, 1985, after being informed that Mr. Boyce had been at the union office in Barstow on May 29, 1985, Mr. Graham, Mr. Boyce's supervisor, conducted an investigative discussion with Mr. Boyce regarding his whereabouts on May 29, 1985. During the course of the investigative discussion, Mr. Graham made it clear that his only concern was Mr. Boyce's violation of Article 8, Section 4 of the collective bargaining agreement which according to the Respondent's interpretation prohibited Mr. Boyce from conducting union representational functions at the off-base union office without prior permission from management.

On May 26, 1985, Mr. Boyce was given a letter of reprimand and charged with 35 minutes of AWOL. The letter reads in pertinent part as follows:

> a. On 29 May 1985 at approximately 1455, I was informed by CPO that you had

> been contacted by phone at the Union Hall in Barstow by a representative from the Federal Labor Relations Authority. The representative was to meet with you at the Union Hall.
>
> b. On 4 June 1985, this matter was discussed with you. You denied receiving a phone call. I had previously advised you that the Master Labor Agreement, Article 8, Section 4, provides that official time will be approved only for representational functions performed at the activity, etc. I had also advised you on 23 May 1985 that you were not authorized to go to the Barstow Union Office on official time. You contend that this article does not apply to you as President of the Union. The reasons you offer on your whereabouts on 29 May 1985 are not acceptable; therefore, you have been carried on unauthorized absence status for 35 minutes on 29 May 1985.3/

The record further establishes that the Respondent and the Authority have been involved in numerous unfair labor practices and that the Respondent always released employees on official time when informed by Authority agents that they wished to talk to such employees in connection with Authority proceedings. Prior to the events underlying the instant complaint the Authority never met with an employee on official time without clearing it with the Respondent. Further, it was always the Authority agent and not the employee who notified the Respondent that a meeting was going to be held with an employee.

Discussion and Conclusions

The General Counsel points out that the Authority has held that (1) the granting of official time to employees pursuant to Section 7131(c) of the Statute for purposes of participating in the processing of unfair labor practice

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3/ It appears that in awarding Mr. Boyce a 35 minute AWOL, Respondent calculated the time from 2:55 p.m. when it discovered he was off the premises to the 3:30 p.m. quitting time, reasoning that the Authority agent could not have met with Mr. Boyce before such quitting time.

charges is within the unreviewable discretion of the Regional Director or the Regional Director's agents, and (2) that Section 7104(f)(2)(A) of the Statute specifically empowers the General Counsel to determine the manner in which investigations are to be conducted, including the situs of interviews related thereto.

Relying on the foregoing and the fact that the Authority's agent had informed the Respondent that he was going to meet with Mr. Boyce, the General Counsel takes the position that the Respondent violated Sections 7116(a)(1) and (8) of the Statute when it reprimanded Mr. Boyce and charged him with 35 minutes AWOL for his actions in meeting with the Authority's representative on May 29, 1985 in the Union's off-base office in Barstow.

The Respondent's counsel, who agrees with the General Counsel's conclusions with respect to the state of the law, takes the position that in the absence of prior notice from either the Authority's agent or Mr. Boyce that Mr. Boyce was going off the base to meet the Authority's agent in connection with pending unfair labor practices, Mr. Boyce violated the provisions of the collective bargaining contract as interpreted by Respondent. According to the Respondent the reprimand and the 35 minute AWOL were based upon Mr. Boyce's actions in violating the contract by leaving the base without permission and was unrelated to the fact that he subsequently met with the Authority's agent for purposes of discussing pending unfair labor practices.

Inasmuch as the General Counsel has correctly summarized the state of the law and since Respondent appears to acknowledge same, the sole issue remaining for resolution is whether, as contended by the Respondent, under the particular facts of this case Respondent was at liberty to reprimand and impose a 35 minute AWOL on Mr. Boyce for leaving the Respondent's premises without permission to prepare for a subsequent meeting with an Authority agent.

The record establishes that the Respondent and the Union were parties to a collective bargaining agreement which contained various provisions concerning the awarding and use of official time by the Union's President in connection with representational activities. According to Respondent's interpretation of such provisions, which interpretation had previously been made known to Union President Boyce, the Union President was not allowed to utilize official time to conduct representational activities off the base without prior management permission. The record further establishes that at all times prior to the instant events Authority agents when desiring to talk to the Union President or any other unit employee in connection with a matter of Authority interest had always given prior notice to management. The record also establishes that the Respondent had never denied Authority agents the opportunity to meet with unit employees on official time, nor does it appear that the Respondent had ever in the past penalized unit employees for meeting with Authority agents. Finally, the record establishes that aside from telling Respondent about 3 p.m. on May 29, 1985 that she, the Authority agent, was on her way to the union office in Barstow to meet Mr. Boyce, no other notice of the meeting was given to Respondent.

In view of the above facts, I find that the Respondent did not violate the Statute when it disciplined Mr. Boyce after discovering his unauthorized visit to the union office in Barstow. In reaching this conclusion, I find that while the Authority's agents certainly have a right to meet with employees on official time and to determine where such meetings will be held, such rights are not paramount to both the mission of an agency and its responsibility to monitor the activities of its work force. Here there is no evidence of prior notice of the meeting or that Mr. Boyer had received permission to go to the union office in Barstow as required by Respondent's interpretation of the contract.

Having left the Respondent's premises without prior permission in defiance of Respondent's announced interpretation of the official time provisions of the collective bargaining contract and without prior notice to Respondent from either himself or the Authority's agent that his actions were for purposes of meeting with the Authority's agent to discuss a pending unfair labor practice, I find that under the circumstances the Respondent did not violate the Statute when it subsequently gave Mr. Boyce a letter of reprimand and a 35 minute AWOL for such conduct. I further find that the reprimand and 35 minute AWOL were not based on Mr. Boyce's activity in meeting an Authority agent but rather his actions in leaving the premises without prior permission in violation of the Respondent's interpretation of the collective bargaining agreement.

In sum I find that while the Authority's agents are free to conduct investigations on official time and determine where such investigations should be held, sensible administration not to mention common courtesy require advance notice so that an Agency can make appropriate arrangements to carry out the mission of the Agency and its responsibility of knowing at all times the whereabouts of its employees.

Accordingly, I recommend that the Authority adopt the following order dismissing the complaint in its entirety.

ORDER

It is hereby Ordered that the Complaint in Case No. 8-CA-50418 should be, and hereby is, dismissed in its entirety.

BURTON S. STERNBURG
Administrative Law Judge

Dated: March 11, 1986
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
EIELSON AIR FORCE BASE, ALASKA

Respondent

and

Case No. 9-CA-30009

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1836, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This case is before the Authority on exceptions filed by the Respondent to the attached Decision of the Administrative Law Judge. The Charging Party (the Union) has filed an opposition. The case concerns whether the Respondent failed and refused to bargain in violation of section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by terminating patronage privileges for civilian employees at the Base Exchange and concessions at Eielson Air Force Base in September 1982.

We concur with the Judge's conclusion that the Respondent violated the Statute as alleged, and his recommended remedy, with modified reasoning.

II. Background

The Respondent's facility, Eielson Air Force Base (the Base), is located in the middle of Alaska, about 26 miles east/southeast of Fairbanks and 300 miles from the Canadian border. In January 1983 its workforce included about 3000 military personnel and about 350 civilian employees. The Union is the exclusive representative for about 230 of the Respondent's civilian employees, including nonappropriated fund employees.

As found by the Judge, for about 17 years prior to 1982, the Respondent had a practice of granting its civilian employees patronage privileges at the Base Exchange (including the main exchange, groceteria, gas station, and furniture store) and Base concessions (including a beauty shop, barber shop, laundromat, and movie theater). The privileges were extended to employees who lived off-base and more than 13 miles from Fairbanks (more than halfway toward the Base along the main highway--the "Old Richardson Highway"--between the Base and Fairbanks).

According to the record, the Respondent started the practice of granting the Exchange and concession privileges to civilian employees because there were few if any shopping and service facilities then available to employees living off-base, in the vicinity of the Base. Although these facilities were present in Fairbanks, the roads between Fairbanks and the vicinity of the Base were difficult and especially dangerous for travel in winter months. For these reasons, it was difficult for employees at the Base to maintain adequate standards of living without the Exchange and concession privileges. The Respondent granted the privileges for these reasons in order to maintain a sufficient and stable civilian force and routinely requested of the Alaskan Air Command that the privileges be continued for these reasons. The existence of these privileges had been described in an Alaskan Air Command pamphlet which purported to provide "prospective employees with information about the Air Force mission, and living and working conditions in Alaska."

On April 22, 1981, the Respondent notified the Union that action had been initiated to extend Exchange privileges through December 31, and that negotiations should begin for an extension beyond that date. The Union was asked for its position on continuing or changing the method of extending Exchange privileges. The Union requested negotiations with respect to the privileges, but did not submit a written position. At a subsequent negotiation session in December 1981, covering a range of other matters, the Respondent offered its reasons for terminating the Exchange privileges and the Union offered its reasons for continuing the established past practice. At the conclusion of this meeting the parties agreed to this Memorandum of Understanding (MOU):

> The agency determination to withdraw limited Exchange Privileges to civilian employees is based upon compelling need to avoid undue impairment to military personnel resulting from programmed increases due to mission change. However, the parties agree that the present convenience should continue until such time that the agency's study shows the adverse impact and affords the Union opportunity to accept or reject the study.

The Respondent's study of the situation, once completed, was provided to the Union in June 1982, with notice that the Exchange privileges would end on July 30, 1982. The study concluded that the termination of the Exchange privileges was necessary to ensure adequate service for military personnel and because substitute facilities were available off-base--primarily at North Pole, Alaska, 13 miles toward Fairbanks on the Richardson Highway. The Union advised the Respondent that it disagreed with the study and requested negotiations.

The parties met in late July 1982. The Union explained its objections to the study and the termination of the Exchange privileges, and reasserted its bargaining rights. The Respondent rejected the bargaining request, taking the position it had no duty to bargain. The Respondent asserted that the parties had already agreed, under the MOU of December 1981, that the termination of the Exchange privileges was nonnegotiable, because the Exchange privileges did not concern conditions of employment. The Respondent stated that the Exchange privileges would end on July 30, 1982. The Respondent assured the Union that it would coordinate the procedures used for the change and that the concession privileges would continue.

In August 1982, the Respondent advised the Union that the concession privileges would also be terminated and changed the effective date from July 30 to September 30, 1982. The Respondent terminated the Exchange and concession privileges in September 1982.

The Judge decided that the Respondent violated section 7116(a)(1) and (5) of the Statute as alleged in the complaint. He concluded that the Exchange and concession privileges concerned conditions of employment of the employees under section 7103(a)(14) of the Statute. He also concluded that negotiations on the privileges were not barred by a "compelling need" for agency regulations--Department of Defense Directives and Department of the Air Force Regulations--under section 7117 of the Statute. To remedy the violation, he recommended that the Respondent be ordered to reinstate the privileges it terminated in September 1982 and to negotiate over the terminations as requested by the Union.

III. Positions of the Parties

The Respondent argues that the continuation of the Exchange and concession privileges did not concern conditions of employment under section 7103(a)(14) of the Statute. It argues that a compelling need exists for Agency regulations, Department of Defense Directives and Air Force Regulations, so as to bar negotiations on the privileges at the level of exclusive recognition and that the Judge erred in deciding these compelling need issues under section 7117 of the Statute in the unfair labor practice proceeding. For these reasons the Respondent argues that it was not obligated to negotiate on the continuation of the privileges. Assuming that it was obligated to negotiate on these matters, the Respondent argues that it discussed the matters with the Union so as to fulfill its duty to negotiate. The Union supports the Judge's decision.

IV. Analysis

A. Did the termination of the employees' privileges at the Base Exchange and concessions concern the employees' conditions of employment under section 7103(a)(14) of the Statute?

In Antilles Consolidated Education Association and Antilles Consolidated School System, 22 FLRA No. 23 (1986), we explained the two basic factors which determine whether a matter proposed for negotiations involves a condition of employment of bargaining unit employees:

(1) Whether the matter proposed to be bargained pertains to bargaining unit employees; and

(2) The nature and extent of the effect of the matter proposed to be bargained on working conditions of those employees.

Applying the Antilles analysis to the matters at issue in this case, it is apparent that the first factor is satisfied. The Union has sought negotiations on the terminations of existing privileges for employees it represents in a unit of exclusive recognition.

Regarding the second factor, while the privileges here are directly analogous to the privileges in Antilles, the circumstances of the privileges in this case differ from the circumstances in Antilles. In Antilles, the Union sought to create new privileges at the agency's retail, recreational, and medical facilities. The Union provided no evidence and the record failed to reveal how employees' access to the facilities was related to the employees' working conditions. For these reasons, in Antilles, we held that the privileges were not concerned with the employees' conditions of employment so as to be within the agency's duty to bargain.

The privileges in this case had been continued over a long period of time and had been described as a part of "living and working conditions in Alaska." They were established by the Respondent because they were necessary in order to ensure that employees could maintain adequate living conditions in connection with their employment and so that the Respondent could maintain a sufficient and stable civilian workforce. The hearing testimony shows that some employees have located their homes along the Old Richardson Highway southeast of the Base toward the Canadian border. Although commercial facilities have been developed at North Pole, Alaska, 13 miles northwest of the Base, these employees' use of the commercial facilities would require regular commuting distances--for routine household necessities--of at least 26 miles round trip, in winter conditions which are difficult and dangerous.

On the basis of these facts and circumstances, the second factor in the test set forth in Antilles has been met. The matter proposed to be bargained, the extent and manner in which the Exchange and concession privileges will be terminated, concerns conditions of employment under section 7103(a)(14) of the Statute. See Department of the Army, Dugway Proving Ground, Dugway, Utah, 23 FLRA No. 80 (1986); U.S. Department of Justice, U.S. Immigration and Naturalization Service, 14 FLRA 578 (1984).

B. Do Agency regulations for which a compelling need exists bar negotiations on the termination of the privileges?

In Antilles and Overseas Education Association, Inc. and Department of Defense, Office of Dependents Schools, 22 FLRA No. 34 (1986) (Union Proposal 5), petition for review filed, Overseas Education Association v. FLRA, No. 86-1491 (D.C. Cir. September 3, 1986), the agencies argued that the parties could not negotiate the matters at issue because control over the subject matter had not been delegated to management officials at the level of bargaining. The Respondent offers essentially the same argument in this case. As we explained in Antilles and reiterated in Office of Dependents Schools, an agency may not foreclose bargaining on an otherwise negotiable matter because authority does not reside at the level of exclusive recognition.

Under section 7114(b)(2) of the Statute, an agency is obligated to provide representatives at the level of bargaining who are authorized to negotiate and enter into agreements on all matters within the scope of negotiations. For example, American Federation of Government Employees, AFL-CIO, Local 1409 and U.S. Army Adjutant General, Publications Center, Baltimore, Maryland, 18 FLRA No. 68 (1985). This statutory obligation to provide authorized representatives for negotiations cannot be obviated by an agency's internal regulations. In contrast, the matters which such authorized representatives can negotiate, that is, the scope of bargaining at the level of negotiations, may be limited by internal regulations for which a compelling need exists under section 7117 of the Statute. See, for example, National Federation of Federal Employees, Local 1429 and U.S. Department of the Army, Letterkenny Army Depot, 23 FLRA No. 13 (1986) (the agency regulation at issue set the number of hours which local management could authorize for an excused absence).

The Respondent's argument that the Judge could not decide whether a compelling need exists for its regulations is inapposite because the argument concerns the organizational level to which authority had been delegated rather than compelling need. Even assuming that this argument was relevant to this case, the position urged by the Respondent is inconsistent with established Authority precedent. In Defense Logistics Agency (Cameron Station, Virginia), 12 FLRA 412 (1983), affirmed sub nom. Defense Logistics Agency v. FLRA, 754 F.2d 1003 (D.C. Cir. 1985), the Authority held that compelling need determinations may appropriately be decided in an unfair labor practice proceeding. But see United States Army Engineer Center v. FLRA, 762 F.2d 409 (4th Cir. 1985), reversing U.S. Army Engineer Center and Fort Belvoir, 13 FLRA 707 (1984). We reaffirmed this conclusion with further reasoning in Aberdeen Proving Ground, Department of the Army, 21 FLRA No. 100 (1986), petition for review filed Aberdeen Proving Ground, Department of the Army v. FLRA, No. 86-2577 (4th Cir. June 26, 1986).

C. Did the Respondent fulfill its duty to bargain?

As found by the Judge, the Respondent discussed its decision to terminate the Exchange privileges with the Union in December 1981 and July 1982. However, the Respondent rejected the Union's request for negotiations stating, at all times, that it would not negotiate on the termination of the privileges. Agreeing with these findings of the Judge and his finding that the Respondent's interpretation of the parties' MOU of December 1981 is untenable, we concur with his conclusion that the Respondent failed to fulfill its statutory duty to bargain.

V. Conclusion; remedy

The termination of the Exchange and concession privileges at issue in this case concerned conditions of employment of employees under section 7103(a)(14) of the Statute. Agency regulations do not bar negotiations on the privileges by the Respondent at the level of exclusive recognition. The Respondent failed to fulfill its duty to bargain on these matters. Accordingly, we conclude that the Respondent violated section 7116(a)(1) and (5) of the Statute as alleged in the complaint.

The Authority has previously determined that where management has made a unilateral change in a negotiable term and condition of employment, effectuation of the purposes and policies of the Statute requires imposition of *status quo ante* remedies, absent special circumstances, in order not to render meaningless the mutual obligation to negotiate. Veterans Administration, West Los Angeles Medical Center, Los Angeles, California, 23 FLRA No. 37 (1986) (n.3 and accompanying text). The Respondent has not excepted to the Judge's recommended *status quo ante* remedy and it has not shown that special circumstances exist so as to negate the imposition of such a remedy. In these circumstances we decide that a *status quo ante* remedy is warranted.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Department of the Air Force, Eielson Air Force Base, Alaska, shall:

1. Cease and desist from:

(a) Unilaterally terminating Exchange and concession privileges at Eielson Air Force Base for employees represented by the American Federation of Government Employees, Local 1836, AFL-CIO, without first providing the American Federation of Government Employees, Local 1836, AFL-CIO, with the opportunity to negotiate these changes.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Restore the Exchange and concession privileges for employees represented by the American Federation of Government Employees, Local 1836, AFL-CIO, which existed prior to the termination of the privileges in September 1982.

(b) Notify and, upon request, negotiate with the American Federation of Government Employees, Local 1836, AFL-CIO, concerning any change in Exchange and concession privileges for employees represented by the American Federation of Government Employees, Local 1836, AFL-CIO.

(c) Post at its facility copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, Eielson Air Force Base, Alaska, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Federal Labor Relations Authority's Rules and Regulations, notify the Regional Director, Region IX, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., October 16, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(23 FLRA No. 83)

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally terminate the Exchange and concession privileges at Eielson Air Force Base for employees represented by the American Federation of Government Employees, Local 1836, AFL-CIO, without first affording the American Federation of Government Employees, Local 1836, AFL-CIO, with the opportunity to negotiate these changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL restore the Exchange and concession privileges for employees represented by the American Federation of Government Employees, Local 1836, AFL-CIO, which existed prior to the termination of the privileges in September 1982.

WE WILL notify and, upon request, negotiate with the American Federation of Government Employees, Local 1836, AFL-CIO, concerning any change in Exchange and concession privileges for employees represented by the American Federation of Government Employees, Local 1836, AFL-CIO.

____
(Activity)

Dated: _______________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region IX, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103-9991, and whose telephone number is: (415) 995-5000.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF THE AIR FORCE,
EIELSON AIR FORCE BASE, ALASKA

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1836, AFL-CIO

Charging Party

Case No. 9-CA-30009

Major Charles L. Brower, Esquire
For the Respondent

Stefanie Arthur, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns an unfair labor practice complaint issued by the Regional Director, Region IX, Federal Labor Relations Authority, San Francisco, California against the Department of the Air Force, Eielson Air Force Base, Alaska (Respondent), based on charges filed by the American Federation of Government Employees, Local 1836, AFL-CIO (Charging Party or Union). The complaint alleged, in substance, that Respondent violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq. (the Statute), by refusing to negotiate with the Union regarding the Respondent's decision to discontinue limited base exchange privileges enjoyed by certain employees in the bargaining unit represented by the

Union and by unilaterally discontinuing such privileges.[1] Respondent's answer, or stipulation, admitted the jurisdictional allegations relating to the Respondent, Charging Party, and the filing of the charges, but denied any violation of the Statute.

A hearing was held in Fairbanks, Alaska. The Respondent, and the General Counsel, FLRA were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and the General Counsel filed helpful briefs, and the proposed findings have been adopted in whole or in substance where found supported by the record as a whole. Based on the entire record,[2] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

Congressional Interest In Military Exchanges

Military exchanges are essential to the morale and esprit de corps of military personnel. They insure that adequate supplies of household necessities are available at reasonable rates to persons in the military service who are unable to select the location in the world where they perform their duties.[3] Consequently, various subcommittees of the U.S. House of Representatives Armed Services Committee (HASC) have, over the years, shown considerable concern about the use of military exchange by unauthorized patrons. (R.Ex. 9, p. 12344).

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[1] The Regional Director's motion to withdraw that portion of the consolidated complaint pertaining to Case No. 9-CA-20210, an unrelated matter, was granted. The Regional Director approved a settlement agreement in that case on January 12, 1984.

[2] Respondent's post-hearing motion that official notice be taken of Respondent's Exhibit A, a letter from the Honorable Melvin Price, Chairman of the House Committee on Armed Services, to Mr. Tom Garnett, Director of Labor Management Relations, Department of Defense, enclosing a letter to the Honorable Barbara Jean Mahone, Chairman, Federal Labor Relations Authority, is granted.

[3] R.Ex. 9. pp. 12350-54, sets forth a brief history of the origin and purpose of the exchange service.

In consonance with the recommendations of a subcommittee of the HASC, and in order to curb abuses found by that subcommittee, the military services jointly issued in 1949 the Armed Services Exchange Regulations (ASER), forerunner of the current Department of Defense Directive (DODD) 1330.9 (R.Ex. 9, p. 12349). The subcommittee, then as today, was especially interested in establishing uniform guidelines under which all armed forces exchanges would operate (R.Ex. 9, pp. 12349-50).

In 1957 a HASC subcommittee expressed considerable concern regarding the seemingly liberal interpretation prevalent in the services in granting deviations from both the list of authorized exchange resale items and the list of authorized exchange patrons (R.Ex. 9, p. 12355, 3rd and 7th paragraphs). Similarly, in 1970 a HASC subcommittee concluded that with respect to exchange operations, the Office of the Secretary of Defense (OSD) was providing too little direct policy determination and very limited surveillance (R.Ex. 9, p. 12354). Consequently, pursuant to the recommendations of the subcommittee, the ASER was amended to require that all deviations from the regulations be approved by the Assistant Secretary of Defense (Manpower and Reserve Affairs) and the HASC itself (R.Ex. 9, p. 12356; R.Ex. 10, p. 15162; and R.Ex. 11, p. 16635, last partial paragraph).

Finally, in 1972 yet another HASC subcommittee considered, among other things, the issue of deviations from the ASER. The subcommittee concluded,

> [T]he office of the Assistant Secretary of Defense (MRA) has clearly established the desirable philosophy of complete justification of each deviation; and, . . . the services are now properly aware of the desires of the subcommittee and OSD regarding stringent application of deviation authorizations. In view of the effective action taken, this subcommittee concludes that approval of each deviation by the House Armed Services Committee is no longer required.
>
> Accordingly, the subcommittee recommends the previous authority of the service Secretaries to authorize deviations, without further delegation, should be restored. (R.Ex. 11, p. 16636).

The Regulations

Department of Defense Directive (DODD) 1400.6, dated February 15, 1980, entitled, "DOD Civilian Employees in Overseas Areas," (R.Ex. 7), applies to civilian employees in Alaska; DODD 1330.9, dated July 8, 1980, entitled, "Armed Services Exchange Regulations", (R.Ex. 6), sets forth uniform policies relating to the operation of the Army, Navy, Air Force, and Marine exchanges; and Air Force Regulation 147-14, dated November 15, 1978, entitled, "Army and Air Force Exchange Operating Policies", (G.C. Ex. 2), sets forth the operating policies of the Army and Air Force Exchange Service (AAFES).

Since at least November 15, 1978 Air Force Regulation (AFR) 147-14, paragraph 2-10 has provided that in Alaska, among other places, limited exchange and motion picture theater privileges may be extended to the following persons and organizations:

> a. Civilian employees with transportation agreements and their dependents who are employees of the U.S. Government including those paid from nonappropriated funds.
>
> b. Specific categories of personnel or organizations authorized by the responsible commander when determined to be in the best interest of the mission of the command concerned . . . (G.C. Ex. 2).

Appendix D to AFR 147-14 is to be used in evaluating requests for exceptions to normal patronage rules. (Tr. 158). The criteria includes personal hardship, whether adequate commercial retail facilities are available, and the degree of difficulty involved in visiting such facilities. Appendix D also indicates that requests from installation commanders for exceptions are to go through command channels to the appropriate Secretary of the Department concerned for approval. (R.Ex. 3).

Pursuant to DODD 1330.9, DOD civilian employees, working on, but residing off, Alaskan military reservations are granted limited privileges of the fountain, snack bar, and restaurant when the local commanding officer determines that these facilities are not conveniently available from other sources. Only the Secretary of the Military Department (the Air Force in this case) may grant deviations involving patron privileges, and then only if deviation is necessary to alleviate individual hardship. The Directive requires that such deviations be reviewed annually and that a report be submitted specifying such deviations and their justifications.

Section 1-100 of DODD 1330.9 provides that "supplementary rules, regulations, and directives of the Military Departments, not in conflict with these regulations shall remain in full force and effect."[4] (R.Ex. 6, par. 1-100, 1-102, 2-201.6). The Air Force specifically issued amendments to its regulation, AFR 147-14, following the revision of DODD

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[4] Respondent takes the position that AFR 147-14 and DODD 1330.9 are "in conflict" to the extent that AFR 147-14 allows the "responsible commander" to grant privileges whereas under DODD 1330.9 only the Secretary of the Air Force has authority to grant privileges to civilian employees. However, as noted, the additional requirements of Appendix D of AFR 147-14 appear consistent with DODD 1330.9 in that approval by the Secretary is also required for exceptions to normal patronage rules. This Appendix also sets forth how a model form for such a request should be prepared for forwarding through channels.

1330.9 in July 1980 and at that time only changed paragraph 2-10 so as to insert the word "limited" before "exchange and motion picture theater privileges" (G.C. Ex. 2; "Interim Action" attachment at p. 2).

As noted, Department of Defense Directive Number 1400.6, dated Febraury 15, 1980, entitled, "DOD Civilian Employees in Overseas Areas", applies to civilian employees in Alaska and provides as follows in paragraph C. 4 and 5.:

> 4. In making a determination of the numbers and types of U.S. employees for overseas areas, the Military Service Commander shall consider the ability of the command to ensure adequate housing; subsistence; and medical, commissary, exchange, laundry, transportation, and other essential facilities and services. Except when required to meet unexpected emergency conditions, an overseas commander shall not request recruitment from the United States unless the command can provide such facilities to meet health and decency standards.
>
> 5. In those overseas areas where DoD employees cannot enjoy the facilities of the civilian community without restriction or where appropriate and adequate facilities do not exist or are not readily available, the military commander shall allocate facilities under the commander's jurisdiction in accordance with a standard of eligibility that provides equitable treatment to both military and civilian personnel recruited from the United States.

Since at least July 1969, an Alaskan Air Command pamphlet has purported to provide "prospective employees with information about the Air Force Mission, and living and working conditions in Alaska." (G.C. Ex. 7). The pamphlet was last revised in 1981. (G.C. Ex. 8). The pamphlet states under "Base Exchange, Theater, Commissary, and Club Privileges," in part, as follows:

> "Employees residing 13 or more miles south of Fairbanks have limited exchange and theater privileges at Eielson AFB."

Once a new recruit in the "lower 48" is tentatively selected for employment, he or she is sent the pamphlet either by the designated sponsor, the personnel office, or the new employee receives it from the personnel office upon arrival in Alaska. (Tr. 246-247; 223-224).

The Collective Bargaining Agreement

Article Seven, section 3 of the collective bargaining agreement between Respondent and the Charging Party, dated December 1979, provides:

> It is further agreed and understood that any prior benefits, practices and understandings which have been mutually acceptable to the parties which are not specifically covered by this agreement shall not be changed without the parties first meeting and conferring on the subject. (R.Ex. 4).

The Practice

Prior to June 28, 1982, and for at least seventeen years prior to that date, unit employees of Respondent who resided thirteen or more miles[5] south of Fairbanks, Alaska, along the Old Richardson Highway[6] enjoyed certain limited base exchange privileges at Eielson Air Force Base.

The privileges afforded these employees included, inter alia, the use of the Base Exchange, gas station, furniture store, theater, laundromat, beauty shop, and dry cleaners (Tr. 6)[7] In order to use the various exchange and concession facilities, proper identification was required. Respondent issued each employee who lived within the designated area an identification card marked "limited exchange" and "theater" which authorized use of the various facilities by such employees and their dependents. (Tr. 47). Approximately 103 of the 230 unit employees enjoyed these privileges.

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[5] During the long and difficult winter months, driving is often very difficult due to the cold temperatures, snow, ice, and fog. (Tr. 32-34). The 13 mile limitation was imposed because it was the half-way mileage point between Fairbanks and Eielson Air Force Base. Eielson is located approximately 26 miles south of Fairbanks. For those who lived north of the 13 mile limit, it was closer for them to go to Fairbanks. (Tr. 148-149). For those who lived south, it was closer to use the Base Exchange. Some unit employees live ten to fifteen miles south of Eielson and thus 35 or 40 miles south of Fairbanks along isolated country roads. (Tr. 32). North Pole, Alaska is approximately 11-12 miles north of Eielson Air Force Base between Fairbanks and Eielson. (Tr. 32). The community has grown considerably in recent years and has some commercial facilities, including at least one modern grocery store.

[6] The Richardson Highway, both the new and the old, begins in Fairbanks and runs south past Eielson to the Canadian border. There are few towns in the area south of Fairbanks, and addresses are often referred to in relation to mileage on the Richardson Highway (Tr. 32).

[7] The various facilities which are part of the Base Exchange--the main exchange, the groceteria, the gas station, and the furniture store--as well as the so-called concessions--beauty shop, barber shop, laundromat, and theater--will be referred to as limited exchange privileges except where the distinction between Base Exchange and concession facilities is material.

Presumably, Respondent's requests to continue the Base Exchange privileges for civilian employees residing 13 or more miles south of Fairbanks was routinely approved on an annual basis for a number of years.[8/]

Current Events

In January 1981, Major Argentino Font, Jr., Director of Personnel, Eielson Air Force Base, received correspondence from the Alaskan Air Command requesting that Eielson submit its annual request for exceptions regarding exchange privileges. Major Font reviewed AFR 147-14 and Appendix D [9/] and questioned whether an exception request could still be justified under the listed criteria. He advised the Alaskan Air Command of his concerns and of the obligations imposed by the negotiated agreement. (Tr. 146-155). By letter dated April 20, 1981 the Alaskan Air Command advised Respondent as follows:

> 1. You are granted authority to extend the waiver for limited exchange privileges to those nonappropriated and appropriated fund employees who reside south of 13-mile Old Richardson Highway through 31 December 1981. The purpose of this extension is to allow sufficient time to negotiate this practice with the union, and determine if the conditions within the civilian community justify further extension.
>
> 2. The Civilian Personnel Office Labor Relations Staff is available to assist and advise you in this action.

By letter dated April 22, 1981 Respondent's labor relations officer, Josh Malone, notified the Union president, Mary Metzger, that action had been initiated to extend Base Exchange privileges through December 31, 1981, and that negotiations should begin for any extension beyond December 31, 1981. The Union was asked to provide by August 31, 1981 its position in writing with respect to justification for continuation or changes in the method of extending Base Exchange privileges. (G.C. Ex. 9). By letter dated August 31, 1981, the Union, by Metzger, requested negotiations with respect to the Base Exchange privileges, but did not submit a written position (G.C. Ex. 10).

[8/] The record does not reflect whether the approval was gained at the Alaskan Air Command or Secretary of the Air Force level. Respondent argues that it was at the Alaskan Air Command level in violation of DODD 1330.9. See fn. 4.

[9/] Major Font testified that he was not aware of DODD 1330.9 until sometime after June 1982. (Tr. 186).

The parties met on or about December 18, 1981. Several representatives of each side were present. Local Union president Mary Metzger, national Union representative Robert Nogler, and Respondent's Director of Personnel Major A. Font served as primary spokespersons for the respective parties. Three topics were addressed at this meeting: renegotiation of the parties' collective bargaining agreement, an unfair labor practice charge which the union had filed concerning worker's compensation, and Base Exchange privileges (Tr. 49:19-50:30). When the topic of Base Exchange privileges was broached, management offered its reasons for proposing to terminate civilian Base Exchange privileges, and the Union offered its reasons for continuing the established past practice (Tr. 51, 162-165).

The December meeting culminated with the execution of a Memorandum of Understanding by Union president Metzger and Base Commander Colonel Carol Hughes which provided as follows:

> The agency determination to withdraw limited Exchange Privileges to civilian employees is based upon compelling need to avoid undue impairment to military personnel resulting from programmed increases due to mission change. However, the parties agree that the present convenience should continue until such time that the agency's study shows the adverse impact and affords the Union opportunity to accept or reject the study. (G.C. Ex. 11).

The term "convenience" was used by both parties in an apparent effort to avoid a dispute at the time over whether Base Exchange privileges are a condition of employment. (Tr. 167). Thereafter, by letter dated June 26, 1982, Respondent forwarded to the Union the study which it had prepared. Respondent also notified the Union of its intent to discontinue Base Exchange privileges effective July 30, 1982. Referring to the Memorandum of Understanding, Major Font asked Ms. Metzger to reply by July 16, 1982. He stated, "If your response rejects the study, please ensure your position and rationale are included." (G.C. Ex. 12(a) and (b)).

By letter dated July 15, 1982, Metzger notified Respondent that the Union disagreed with the study and requested negotiations on the subject. No further explanation was given. (G.C. Ex. 13).

The parties met on or about July 22, 1982. The Union attempted to explain its objections to the study as well as to the termination of the Base Exchange privileges (Tr. 58-59, 113-114). When Union representative Metzger asserted her position that the Base Exchange privileges were a condition of employment over which the Union was entitled to negotiate, Respondent broke off the meeting. Respondent maintained that it had no obligation to bargain with the Union concerning the termination of Base Exchange privileges. Respondent was of the opinion that the parties, by referring to the exchange privileges in the December 18, 1981 Memorandum of Understanding as a "convenience", had agreed that the exchange privileges were not conditions of employment. (Tr. 198-199). Therefore, Respondent viewed Ms. Metzger's July 22, 1982 contention that exchange privileges were conditions of employment as a 180 degree reversal. Respondent took the position that the purpose of the July 22, 1982 meeting was to simply insure that the exchange privileges would be terminated in accordance with the procedures agreed upon by the parties in the December 18, 1981 Memorandum of Understanding. (Tr. 178-179). Major Font stated his intention to commence implementation on July 30; however, he assured Metzger that he would get back to her "on the procedural aspects of how we were to implement the decision to terminate" (Tr. 181). During the meeting, Font informed the Union that the concessions--beauty shop, barber shop, laundromat and theater--were not included in the change (Tr. 59).[10] Major Font later advised Mrs. Metzger in early August that all concession privileges, other than the snack bar and cafeteria, would also be terminated. He stated, among other things, that there was no impact and that he would be coordinating on the changes sometime in the future.

Shortly after the July 22, 1982 meeting the Union requested the assistance of a federal mediator. When that proved unsuccessful, on August 17, 1982 the Union contacted the Federal Services Impasses Panel (G.C. Ex. 14). The Union requested the Respondent to continue the current Base Exchange privileges until a FSIP decision issued (G.C. Ex. 15; Tr. 60-63).

Sometime after the meeting of July 22, 1982, Respondent changed the termination date from July 30, 1982 to September 30, 1982. (G.C. Ex. 20). On September 1, 1982, while Metzger was away for three weeks of preplanned leave (from approximately August 20 to September 7, 1982), Respondent contacted Union vice president Herman Smith to "coordinate" with him the distribution of two memoranda from Base Commander Hughes concerning Base Exchange privileges. The first of these documents was a memorandum from Respondent advising employees that the privileges would be terminated effective September 30, 1982, together with Respondent's reasons therefor (G.C. Ex. 16). The second document concerned retrieval and reissuance of identification cards (G.C. Ex. 17). Although reluctant to do so in the absence of Mrs. Metzger, Smith did initial the memoranda upon Font's assurance that it was only for coordination--"to let you know that we're going to implement this" (Tr. 118).

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[10] Although denying such a representation to the Union, Font admits that the subject of the concessions was raised and concedes that at the time of the meeting he believed that an ID card could be issued which would allow the civilians access to the concessions, but not the base exchange facilities (Tr. 177). Font also acknowledged that following the July meeting Metzger clearly believed that the concessions would be retained (Tr. 182).

The memoranda were distributed to the employees, and those effected by the changes were reissued new identification cards (Tr. 66-67).

Meanwhile, the parties submitted their respective positions to the FSIP. On October 26, 1982, the Panel declined jurisdiction on grounds that the matter involved threshold questions concerning the employer's obligation to bargain, including underlying questions of fact (G.C. Ex. 22), a position which was reiterated by the Panel in its November 19, 1982 denial of the Union's request for reconsideration (G.C. Ex. 23; 24).

On October 12, 1982, the Union filed the instant unfair labor practice charge; thereafter, on November 10, a first amended charge was filed.

Discussion, Conclusions, and Recommendations

The General Counsel contends that Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to bargain with the Union concerning a change in working conditions of employees in the unit, i.e. termination of limited Base Exchange privileges, including base exchange and/or concession facilities, and its implementation of that change on or about September 1, 1982.

Respondent defends on the basis that exchange privileges are not conditions of employment, and, therefore, Respondent Eielson was lawfully entitled to unilaterally terminate such privileges without first bargaining with the Union. Alternatively, Respondent contends that even if exchange privileges are conditions of employment, it had no duty to bargain about the decision to discontinue such privileges because such bargaining would be inconsistent with DODD 1330.9, an agency regulation for which there is a compelling need. Finally, Respondent contends that even if exchange privileges are conditions of employment, and even if Respondent's duty to bargain about the decision to discontinue exchange privileges was not barred by DODD 1330.9, Respondent fulfilled its duty to bargain as evidenced by the December 18, 1981 Memorandum of Understanding.

Condition of Employment

The duty to bargain under the Statute extends only to "conditions of employment,"[11] i.e., personnel policies, practices, and matters affecting working conditions. In construing that statutory phrase, the Authority has found proposals which concern matters directly affecting "the work situation and employment relationship" of bargaining unit employees to be within the duty to bargain. See National Federation of Federal Employees Local 1363 and United States Army Garrison, Youngson, Korea, 12 FLRA No. 125 (1983). Respondent contends that employee access to shopping facilities, convenience stores, movie theaters, beauty shops, laundromats, and dry cleaning establishments maintained for the morale, welfare, and recreation of military personnel is not a part of the work situation or the employment relationship and could only be enjoyed by bargaining unit employees while in a non-duty status.

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[11] Section 7103(a)(14) of the Statute defines "conditions of employment" as follows:

§ 7103. Definitions; application

(a) For the purpose of this chapter--

(continued)

In the circumstances of the present case, the matter of limited base exchange privileges is a condition of employment within the meaning of section 7103(a)(14) of the Statute. In National Federation of Federal Employees, Local 1363 and Headquarters, U.S. Army Garrison, Youngson, Korea, 4 FLRA No. 23 (1980), the Authority held that the matter of ration control was a condition of employment since it was directly related to reasonable standards of health and decency which the agency required as a precondition for employment in an overseas command. In that case, as here, DOD Directive 1400.6 was involved. In the present case, the updated version of DOD Directive 1400.6 identifies adequate commissary, exchange, and laundry facilities as being among the essential facilities and services necessary to be provided "to meet health and decency standards" before an overseas commander (including Alaska) will request recruitment of personnel from the United States.[12] Under this regulation, where DOD employees cannot enjoy the facilities of the civilian community without restriction or where appropriate and adequate facilities do not exist or are not readily available, the military commander is required to allocate facilities to accord equitable treatment to both military and civilian personnel.

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[11] (continued)

. . . .

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . .

[12] Unexpected emergency situations are an exception, but are not alleged or shown to exist in the present case.

Respondent contends that because its study showed that civilians can enjoy the facilities of the civilian community without restriction and adequate facilities do exist and are available off base, it has not created a precondition of employment and the Eielson commander was freed in this instance of the duty imposed by DOD Directive 1400.6. This argument goes to the merits of whether or not facilities are to be provided in this instance and is an appropriate matter for resolution through the bargaining process. It is not relevant to the determination of whether limited base exchange privileges is the kind of matter which is a condition of employment and within the scope of bargaining.

In this instance the matter of limited base exchange privileges, i.e., adequate and available commissary, exchange, laundry, and other essential facilities and services, is a condition of employment. It is directly related to "health and decency standards" which is a precondition to civilian employment in Alaska. Therefore, such matter involves personnel policies, practices, and matters affecting working conditions of unit employees and is within the scope of bargaining under section 7117 of the Statute. National Federation of Federal Employees, Local 1363 and Headquarters, U.S. Army Garrison, Youngson, Korea, supra.

The duty to negotiate in good faith under the Statute requires that a party meet its obligation to negotiate prior to making changes in established conditions of employment, during the term of a collective bargaining agreement, absent a clear and unmistakable waiver of bargaining rights. Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA 9 (1981).

Apart from Respondent's obligation to bargain on this matter generally, the record discloses that not only have certain unit employees had limited base exchange privileges for at least seventeen years, but the agency has been actively involved in its effectuation during that period, i.e., issuing the necessary identification cards, securing annual approval, and holding it out since 1969 in the Alaskan Air Command pamphlet as an attribute of employment. It is well settled that privileges, once granted, may over time mature into established practices tantamount to conditions of employment and that such established past practices may not be changed by Respondent without affording the Union its statutory right to notice and the opportunity to bargain concerning the changes. Department of the Navy, Naval Underwater Systems Center, Newport Naval Base, 3 FLRA 413 (1980); Social Security Administration, Mid-America Service Center, Kansas City, Missouri, 9 FLRA No. 33 (1982).

Compelling Need

Respondent contends that even if exchange privileges are conditions of employment, it had no duty to negotiate the decision to terminate the privileges. Respondent claims that DOD Directive 1330.9, an agency regulation for which a compelling need exists, prohibits the Eielson AFB commander from extending those privileges to the Eielson civilian employees, as only the Secretary of the Air Force is empowered to extend such privileges. Respondent also asserts that a compelling need exists for these regulations inasmuch as they implement a mandate from Congress.[13]

With respect to Respondent's reliance upon DOD directive 1330.9, (R.Ex. 6), nothing in that regulation prohibits negotiations with the Union regarding the extension of Base Exchange privileges nor requires that the privileges be withdrawn. An agency is required to bargain to the full extent of its discretion under both agency and government-wide regulations. See, National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA 748 (1980); National Treasury Employees Union and Internal Revenue Service, 6 FLRA 552 (1981); Department of the Navy, Long Beach Naval Shipyard, 7 FLRA 362 (1981); American Federation of Government Employees and General Services Administration, 11 FLRA No. 54 (1983). The Authority has also held that lacking total discretion, an agency's duty to bargain extends to making appropriate requests to third parties for approval to implement the negotiated agreement. See American Federation of Government Employees, Local 32 and Office of Personnel Management, 8 FLRA No. 87 (1982).

In the instant case although Section 2-201.6 of the DOD Directive provides that civilian employees in Alaska working on but not residing on military reservations "shall be entitled to the privileges of the fountain, snack bar, and restaurant when the local commanding officer determines that these facilities are not conveniently available from other sources", nothing in the Directive indicates that such are the exclusive facilities to which civilians may have access. See DOD Directive 1400.6 (R.Ex. 7). Section 1-102.6 of DOD Directive 1330.9 specifically provides that deviations involving patron privileges may be granted by the Secretaries of the military departments and although delegation of such authority is prohibited, Section 1-100 provides that "supplementary rules, regulations, and directives of Military Departments, not in conflict with these regulations shall remain in full force and effect." Both before and after issuance of DOD Directive 1330.9 on July 8, 1980, the Air Force had a regulation, AFR 147-14, paragraph 2-10 (G.C. Ex. 2) which provides that in Alaska, among other places, limited exchange and motion picture theater privileges may be extended to specific categories of personnel authorized by the commander and, as noted, set out a procedure for securing waivers from the Secretary.

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[13] In this regard, the Authority's Rules and Regulations provide:

§ 2424.11 Illustrative criteria.

> A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria:
>
> . . . .
>
> (c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially non-discretionary in nature.

The fact that authority to grant waivers has been retained at the Secretary level does not relate to the bases for finding that a proposal is not within the duty for bargain under section 7117 of the Statute, i.e. inconsistency with Federal law, Government-wide rule or regulation, or agency regulation to which a compelling need exists. Under section 7114(b)(2) of the Statute, the duty of an agency to negotiate in good faith includes the obligation "to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment." Thus, the Statute clearly requires the parties to provide representatives who are empowered to negotiate and enter into agreements on all matters within the scope of negotiations in the bargaining unit. National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 13 FLRA No. 93 (1983).

More basically, as reflected in the facts, Respondent relies on various recommendations of subcommittees of the House Armed Services Committee for its compelling need defense. While it may be prudent for the Department of Defense to follow such recommendations, as it apparently has, Respondent has furnished no evidence that these Congressional recommendations constitute the legislative history of a public law, or otherwise legally constitute "a mandate to the agency . . . under law or other outside authority . . . ." Compare National Federation of Federal Employees, Local 1669 and Arkansas Air National Guard, 13 FLRA No. 37 (1983). Since Respondent's evidence does not meet the criteria established by the Authority, it has failed to demonstrate compelling need for DOD Directive 1330.9. Thus, Respondent has made no showing to support a finding that the matter of the limited base exchange privileges in issue is outside the duty to bargain under section 7117 of the Statute.

Extent of Bargaining

As an additional defense to the unfair labor practice charge, Respondent contends that in December of 1981 it fulfilled any obligation to bargain with the Union. Respondent argues that its negotiations with the Union resulted in the Memorandum of Understanding (MOU) in which the Union agreed with Respondent's decision to terminate such privileges, reserving only its right to produce evidence to the contrary if it rejected a subsequent management study.

It is well settled that the waiver of a statutory right must be clear and unmistakable. Department of the Air Force, Scott Air Force Base, supra. Nothing in the December 18 agreement either on its face or as explained through evidence of the December 16 discussions, evidences the Union's waiver of its statutory right to bargain concerning termination of Base Exchange privileges. The plain language of the MOU gives the Union the right to accept or reject the study. The MOU is silent with respect to any subsequent negotiations or requirements to come forward with evidence rebutting the study. Absent a clear statement that the Union agreed that no further negotiations would take place and that it was required to come forward with evidence if it rejected the study, it cannot be found that the Union waived its right to engage in negotiations. Office of Program Operations, Social Security Administration, San Francisco Region, 10 FLRA No. 36 (1982). Nor, in my view, does the case involve essentially differing and arguable interpretations of the MOU.

It is undisputed that upon receipt of the study, in July 1982, the Union requested to bargain; that the parties met on July 22 in order to discuss the issue; and that Respondent refused to bargain with the Union concerning the change. In that regard, both Ford and Metzger agreed that their efforts to address the substance of the study and to state their reasons for opposing the change were met with derision. Indeed, Font concedes that Respondent had no intention of negotiating with the Union--that they were going to proceed on the basis of the MOU to terminate the limited Base Exchange privileges and that the only matter remaining was implementation of the agency's decision. No negotiations concerning the change took place on July 22 nor at any time thereafter concerning the termination of Base Exchange privileges. Thus, it is clear that Respondent refused to negotiate with the Union concerning the termination of the limited Base Exchange privileges.

In addition, Respondent failed to negotiate with the Union concerning the implementation of the change in Base Exchange privileges. Although Major Font insists that he committed himself to get back to Mrs. Metzger regarding implementation, he did not so do. Instead, over a month later, when Metzger was away on leave, he contacted Herman Smith and informed Smith that he only wanted him to "coordinate" implementation. Font admitted that he was not engaged in implementation bargaining with Smith, and conceded that he would not have been open to any alternative plans.

The implementation memoranda were distributed following such "coordination" with Smith.

Under these circumstances, it is clear that Respondent failed and refused to bargain with the Union concerning implementation of the change in Base Exchange privileges. Respondent's refusal to bargain concerning the termination of Base Exchange privileges or the implementation thereof constitute unfair labor practices in violation of Section 7116(a)(1) and (5) of the Statute.

As discussed above, the evidence establishes that at the July 22 meeting, Major Font specifically indicated that the concessions were not involved in the termination of Base Exchange privileges which had been previously discussed; in fact, the concessions were not even included in the study prepared following the December 1981 MOU. Thus, Respondent was obligated to give the Union adequate notice and the opportunity to bargain when it determined that concession privileges would also be included in the scope of the change. Major Font advised Metzger in early August that the concession privileges, other than the snack bar and cafeteria, would also be terminated, but simply informed her, among other things, that no impact would be involved, and management would be coordinating on the change. The "coordination" was accomplished as stated above. Under such circumstances, Respondent clearly did not meet its obligation to give the Union advance notice and the opportunity to bargain over these changes in conditions of employment, including the termination of base laundry and dry cleaning facilities. Respondent thereby also committed unfair labor practices in violation of Section 7116(a)(1) and (5) of the Statute.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that the Department of the Air Force, Eielson Air Force Base, Alaska shall:

1. Cease and desist from:

(a) Unilaterally terminating limited base exchange and concession privileges to unit employees who reside 13 or more miles south of Fairbanks, Alaska, along the Old Richardson Highway, without affording the American Federation of Government Employees, Local 1836, AFL-CIO, the employees' exclusive representative, the opportunity to bargain concerning such a decision.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute.

(a) Rescind the memoranda dated September 2, 1982 relating to the termination of civilian employee exchange privileges and restore all conditions of employment related to limited base exchange and concession privileges which were in effect prior to such changes.

(b) Notify the American Federation of Government Employees, Local 1836, AFL-CIO, the employees' exclusive representative, of any decision to terminate the limited base exchange and concession privileges of certain unit employees and, upon request, bargain in good faith concerning the decision to do so.

(c) Post at its facilities copies of the attached Notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Commander, Eielson Air Force Base, Alaska and shall be posed and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to 5 C.F.R. section 2423.30 notify the Regional Director, Region IX, Federal Labor Relations Authority, San Francisco, California, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: March 19, 1984
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterlly terminate limited base exchange and concession privileges to unit employees who reside 13 or more miles south of Fairbanks, Alaska, along the Old Richardson Highway, without affording the American Federation of Government Employees, Local 1836, AFL-CIO, the employees' exclusive representative, the opportunity to bargain concerning such a decision.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the memoranda dated September 2, 1982 relating to the termination of civilian employee exchange privileges and restore all conditions of employment related to limited base exchange and concession privileges which were in effect prior to such changes.

WE WILL notify the American Federation of Government Employees, Local 1836, AFL-CIO, the exclusive representative, of any decision to terminate the limited base exchange and concession privileges of certain unit employees and, upon request, bargain in good faith concerning the decision to do so.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region IX, whose address is: 530 Bush Street, Room 542, San Francisco, California 94108 and whose telephone number is: (415) 556-8106.

(Order Denying Request for Reconsideration
of 22 FLRA No. 2)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

PATENT AND TRADEMARK OFFICE

Agency

and

Case No. 0-AR-1054
(22 FLRA No. 2)

PATENT OFFICE PROFESSIONAL
ASSOCIATION

Union

ORDER DENYING REQUEST FOR RECONSIDERATION

I. STATEMENT OF THE CASE

This matter is before the Authority at this time on a request filed by the Agency seeking reconsideration of the Authority's decision of June 4, 1986, modifying the award of Arbitrator Robert B. Lubic.

II. BACKGROUND

In his award the Arbitrator determined that an earlier interest arbitration award, as to which the Authority dismissed the Agency's exceptions as untimely filed, was final and binding and that the Agency was obligated to implement that award. In its exceptions to Arbitrator Lubic's award, the Agency first contended that to the extent the award was based on a negotiability determination it was deficient. The Authority agreed and modified the award to strike that determination as a basis for directing the Agency to implement the earlier award. The Agency also contended that the award was deficient to the extent that the Arbitrator enforced the interest arbitration award on the basis of section 7122(b) of the Statute. The Agency argued that the disputed provision of the interest arbitration award was inconsistent with section 7106(a) of the Statute and consequently was not enforceable under section 7122(b). The Authority denied the exception stating that under the terms of section 7122(b), the interest arbitration award "became final and binding and the Agency for all purposes was unequivocally obligated to take the actions required by the award." Slip op. at 4.

III. AGENCY'S REQUEST

In its request for reconsideration, the Agency essentially argues that the Authority's decision is deficient because it fails to recognize that the disputed provision in the interest arbitration award is nonnegotiable and void ab initio. In support of its position, the Agency essentially reiterates arguments made before the Authority in its exception contending that the award was not enforceable under section 7122(b).

IV. ANALYSIS AND CONCLUSIONS

Section 2429.17 of the Authority's Rules and Regulations permits a party that can establish "extraordinary circumstances" to move for reconsideration of a decision of the Authority. Here, however, the Agency has not established "extraordinary circumstances" within the meaning of section 2429.17. Rather, the arguments presented by the Agency in support of its request essentially constitute nothing more than disagreement with the merits of the Authority's decision and an attempt to relitigate the matter.

V. DECISION

Accordingly, the Agency's request for reconsideration is denied.*/

Issued, Washington, D.C., October 9, 1986.

C. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ The Agency's request for a stay of the Arbitrator's award is likewise denied.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION
MID-AMERICA PROGRAM SERVICE CENTER

Activity

Case No. 0-AR-1212

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1336

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator John R. Thornell filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., October 9, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
BOSTON REGION

Activity

and

Case No. 0-AR-1169

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1164

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Albert G. Murphy filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C. October 14, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

PANAMA CANAL
COMMISSION

Agency

and

INTERNATIONAL ORGANIZATION
OF MASTERS, MATES AND PILOTS

Union

Case No. 0-AR-1216

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Donald P. Crane filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., October 14, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, LOCAL 2187

Union

and Case No. 0-AR-1219

U.S. ARMY ENGINEER DISTRICT
PITTSBURGH, PENNSYLVANIA

Activity

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Samuel Spencer Stone filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., October 14, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

9/case 398

Federal Labor Relations Authority

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NUMBER 398 REPORT OF CASE DECISIONS November 5, 1986

REPRESENTATION CASE

23 FLRA No. 86 (October 22, 1986)

Columbus Air Force Base Exchange Columbus Air Force Base, Mississippi and National Association of Government Employees, Case No. 4-RO-50034

UNFAIR LABOR PRACTICE CASES

23 FLRA No. 85 (October 22, 1986)

Department of Health and Human Services Social Security Administration, and Social Security Administration Field Operations, Region II and American Federation of Government Employees, AFL-CIO, Local 2369, Case No. 2-CA-50323

23 FLRA No. 87 (October 22, 1986)

Veterans Administration and American Federation of Government Employees, National Council of VA Locals, Case No. 3-CA-30727

23 FLRA No. 89 (October 22, 1986)

Department of the Treasury Internal Revenue Service Wichita District, Wichita, Kansas and National Treasury Employees Union, Case No. 7-CA-30514

NEGOTIABILITY CASES

23 FLRA No. 90 (October 24, 1986)

American Federation of Government Employees, AFL-CIO, Council of Locals No. 214 and Department of the Air Force Logistics Command Wright-Patterson Air Force Base Ohio, Case No. 0-NG-1002

Y3.F 31/21-3:

23 FLRA No. 91 (October 29, 1986)

National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, Case No. 0-NG-934

ARBITRATION CASE

23 FLRA No. 88 (October 22, 1986)

U.S. Naval Ordance Station and International Association of Machinists and Aerospace Workers Local Lodge 830 (Mulhall, Arbitrator), Case No. 0-AR-1123

Federal Labor Relations Authority

23 FLRA No. 85

HHS, SSA and SSA Field Operations, Region II and AFGE, Local 2369, Case No. 2-CA-50323 (Decided October 22, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practices	7116(a)(1)
Agency Violations	7116(e)
Interference, Restraint, Coercion	7118
Derogatory Statements	
Statements By Supervisor or Management Official	
Derogatory Remarks	
Cursing Union Official	
Official Time	
For Not Obtaining Prior Approval Before Using Official Time	
Personal Opinion	
Cursing that Was Not Anti-Union	

DIGEST NOTES

The activity's area director did not violate section 7116(a)(1) when he cursed the union's second vice-president for not obtaining prior approval for official time used in interviewing a grievant. The situation was an emotionally one in which the union representative also cursed. The Judge found that the area director did not attempt to thwart the union representative from speaking to the grievant or otherwise declare or imply that the union representative should abstain from pursuing his union duties. In adopting the Judge's decision, the Authority stressed that it did not view the supervisor's remarks in any way constituting the kind of expression which is authorized by section 7116(e). Rather, the Authority's conclusion was based on the focus and import of the remarks as found by the Judge.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

READEX FICHE best copy available

Federal
Labor Relations
Authority

23 FLRA No. 86

Columbus Air Force Base Exchange, Columbus Air Force Base, Miss. and NFFE, Case No. 4-RO-50034 (Decided October 22, 1986

SUBJECT MATTER INDEX ENTRIES	STATUTE
Representation	7116(e)
Procedure	
Review of Regional Director's Decision	
Mere Disagreement with FLRA R.D. Not a Basis for Review	

DIGEST NOTES

The Authority dismissed an application for review of a Regional Director's Decision and Order on Objections where the application expressed mere disagreement with the Regional Director's findings, which were based on precedent and were not shown to be clearly erroneous or to have prejudicially affected the rights of any party.

Federal Labor Relations Authority

23 FLRA No. 87

VA and AFGE, National Council of VA Locals, Case No. 3-CA-30727 (Decided October 22, 1986)

SUBJECT MATTER INDEX ENTRIES

- Arbitration
  - Finality of Awards
    - FSIP Interest Arbitration Awards
- Federal Service Impasses Panel
  - Interest Arbitration
    - Award [7122] rather than "Final Action" [7119(c)(5)(C)]
    - Travel and Per Diem Expenses Awarded
- Unfair Labor Practices
  - Agency Violations
    - Refusal to Cooperate in Impasse Proceeding
      - Comply With FSIP Order
    - Otherwise Refuse to Comply with the Statute
      - 7122(b)
  - Procedure
    - Forums
      - ULP Proceedings vs. Appeal of FSIP Interest Arb. Award
    - Motion to Strike
      - Matter Not Alleged in Complaint
  - Remedy
    - Reimburse Union for Travel and Per Diem Expenses
    - Reimburse Employees for Travel and Per Diem Expenses

STATUTE

7116(a)(1), (6) and (8)
7118
7119(c)
7119(c)(5)(C)
7122(a) and (b)

DIGEST NOTES

An award resulting form interest arbitration proceedings ordered by FSIP is an arbitration award subject to section 7122 and not a "final action" of the Panel within the meaning of section 7119(c)(5)(C), even if the arbitrator is the Executive Director of FSIP. Appeal of such an award is subject to the same requirements for appeals of other arbitration awards under section 7122. Should an agency fail to comply with awards resulting from FSIP ordered interest arbitration, the agency violates section 7116(a)(1) and (8). Also, an agency failure to comply with such an award constitutes a failure to cooperate with Panel procedures which is a violation of section 7116(a)(1) and (6).

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

The agency violated section 7116(a)(1) and (6) when it failed to comply with the travel and per diem requirements of an award rendered as a result of FSIP ordered interest arbitration. As a remedy, the Authority ordered the agency to reimburse the union for travel and per diem expenses it previously paid employees who were engaged in the preparation and/or negotiation of a new collective bargaining agreement.

The Authority granted the agency's motion to strike in so far as it concerned a violation of 7116(a)(1) and (8) because the complaint in the case did not allege such a violation.

Federal Labor Relations Authority

23 FLRA No. 88

U.S. Naval Ordnance Station and IAM Local Lodge 830 (Mulhall, Arbitrator), Case No. 0-AR-1123 (Decided October 22, 1986

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration	7106(a)(2)(B)
Award Set Aside	7122(a)

Arbitration
  Award Set Aside
    Award Contrary to 7106(a)(2)(B)
  Exceptions Asserted in Appeal
    Award Contrary to 7106(a)(2)(B)
  Overtime Assignment
    Determination of Whether Particular Employee is Qualified
    Establishment of the Qualifications Required for Overtime
  Remedy
    Backpay
   8 hours of Overtime Pay
Negotiability
  Assign Work
    Elements of the Right to Assign Work
      Determine Whether Particular Employees Meet Qualifications
      Establish Qualifications of Each Job

DIGEST NOTES

The arbitrator ruled the under the parties' collective bargaining agreement, management was obligated to have offered overtime work of assisting the operator of the electron beam welding equipment to the grievant. The agency had maintained that grievant was not offered the overtime because, as a general welder, he was not qualified. Nevertheless, the arbitrator award the grievant 8 hours of overtime pay.

In its exceptions, the agency contended that the award was contrary to section 7106(a)(2)(B). In setting aside the award, the Authority found that the arbitrator' award negated the exercise by management of its rights to establish qualifications and to determine whether particular employees meet those qualifications. Thus the award improperly interfered with management's right to assign work under section 7106(a)(2)(B).

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

23 FLRA No. 89

Dep't of the Treasury, IRS, Wichita District, Wichita, Kan. and NTEU, Case No. 7-CA-30514 (Decided October 22, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practices	7116(a)(1) and (2)
Agency Violations	7118

Unfair Labor Practices
  Agency Violations
    Discrimination [7116(a)(2)]
      Disclosure of Confidential Taxpayer Information
  Discipline
    Unique Circumstances Precluding Discipline
      Inadequate Employee Notice of their Authority to Act
  Information
    Confidential Information
      Taxpayer Information Disclosure
    Procedures for Obtaining Information
      Adequate Employee Notice: Disclosure of Confidential Info.
  Remedy
    Explain Procedures for Disclosure of Confidential Information
    Recommend Employees for Quality Step Increase
26 U.S.C. section 6103

DIGEST NOTES

Employees did not have adequate notice that they lacked sufficient authorization for the disclosure of confidential taxpayer information to union attorneys in the course of preparing for a grievance proceeding, the U.S. Court of Appeals for the District of Columbia ruled. National Treasury Employees Union v. FLRA, 791 F.2d 183 (D.C. Cir. 1986). The court agreed with the Authority that 26 U.S.C. section 6103 prohibits the disclosure of confidential taxpayer information by employees for personnel matters absent appropriate authorization for disclosure. However, the court determined that in the "unique circumstances" present in the case, the two employees did not have fair notice that the disclosure to their union lawyers was unlawful. The court noted that the employees submitted a written request to their supervisor for information relevant to an employee grievance. The supervisor, who was not authorized to permit disclosure of taxpayer information, essentially told the employees to disclose the information contained in their "dailies" to one another, without obtaining appropriate authorization. This behavior, along with prevalent uncertainty about the process for obtaining authorization for disclosure of taxpayer information in connection with an employee grievance, led the court to its conclusion. Consequently, the Court held that the agency violated section 7116(a)(1) and (2) when it disciplined the employees for disclosure of confidential taxpayer information to their union attorneys. The Authority, accepting the court's opinion as the law of the case, issued a decision and order on remand.

Federal Labor Relations Authority

23 FLRA No. 90

AFGE, Council of Locals No. 214 and Dep't of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, Case No. 0-NG-1002 (Decided October 24, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Negotiability	
Allegation of Nonnegotiability	
Withdrawal of Allegation	

DIGEST NOTES

Where the agency withdrew its allegation of nonnegotiability following a remand of the case from the U.S. Court of Appeals for the District of Columbia, there was no longer an issue in the case as to whether the proposal is within the duty to bargain. Accordingly, the Authority dismissed the petition for review.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES

Federal Labor Relations Authority

23 FLRA No. 91

NTEU and Dep't of the Treasury, U.S. Customs Service, Case No. 0-NG-934
(Decided October 29, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Government-Wide Rule or Regulation	7105(a)(2)(E)
Found to be Government-Wide Regulation	7114(c)
FPM Supplement 335-1, subchapter S5-3	7117(a)(1)
Negotiability	
Positions, Filling of	
Crediting Plans	
Contents of Crediting Plans	
Disclosure of Crediting Plans	
Blanket Disclosure vs. Case by Case Determination	
Freedom of Information Act, Disclosure Under	
FPM Chapter 335, subchapter 1-4, Requirement 3	
FPM Letter 335-15	
FPM Supplement 335-1, subchapter S5 and 6	
5 U.S.C. section 552(b)(2)	

DIGEST NOTES

A proposal is nonnegotiable that requires the blanket disclosure of existing agency crediting plans without regard to whether release of those plans would undermine the fairness and validity of the selection procedure. Although subchapter S5-3 of FPM Supplement 335-3 generally encourages agencies to provide candidates for selection with information about job requirements and rating procedures used to evaluate them, subsection (c) provides that "Crediting plans and rating procedures . . . should not be released . . . if, in the agency's view, such release would undermine the fairness and validity of the selection procedure." Moreover, FPM Letter 335-15 explains that while FPM Supplement 335-1 is intended to allow agencies to provide candidates with information about the measurement process, "[a]n explicit decision is necessary to determine whether crediting plans and related rating information are releasable." FPM Supplement 335-1 is a Government-wide rule or regulation within the meaning of section 7117(a)(1) of the Statute since it is generally applicable to the Federal civilian work force in that it applies to all General Schedule Wage Grade jobs. Consequently, the proposal is nonnegotiable because it is contrary to a Government-wide rule or regulation.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

25 FLRA No. 91

Federal Labor Relations Authority

NTEU and Dep't of the Treasury, U.S. Customs Service, Case No. 0-NG-934 (Decided October 25, 1986)

UBJECT MATTER INDEX ENTRIES — STATUTE

Government-Wide Rule or Regulation — 7105(a)(2)(E)
  Found to be Government-Wide Regulation — 7114(c)
    FPM Supplement 335-1, subchapter S5-3 — 7117(a)(1)
Negotiability
  Positions, Filling of
    Crediting Plans
      Contents of Crediting Plans
      Disclosure of Crediting Plans
        Blanket Disclosure vs. Case by Case Determination
        Freedom of Information Act, Disclosure Under
      FPM Chapter 335, subchapter 1-4, Requirement 2
      FPM Letter 335-15
      FPM Supplement 335-1, subchapter S5 and 6
5 U.S.C. section 552(b)(2)

DIGEST NOTES

A proposal is nonnegotiable that requires the blanket disclosure of existing agency crediting plans without regard to whether release of those plans would undermine the fairness and validity of the selection procedure. Although subchapter S5-3 of FPM Supplement 335-3 generally encourages agencies to provide candidates for selection with information about job requirements and rating procedures used to evaluate them, subsection (c) provides that "Crediting plans and rating procedures . . . should not be released . . . if, in the agency's view, such release would undermine the fairness and validity of the selection procedure." Moreover, FPM Letter 335-15 explains that while FPM Supplement 335-1 is intended to allow agencies to provide candidates with information about the measurement process, "[a]n explicit decision is necessary to determine whether crediting plans and related rating information are releasable." FPM Supplement 335-1 is a Government-wide rule or regulation within the meaning of section 7117(a)(1) of the Statute since it is generally applicable to the Federal civilian work force in that it applies to all General Schedule Wage Grade jobs. Consequently, the proposal is nonnegotiable because it is contrary to a Government-wide rule or regulation.

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23 FLRA No. 85

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION, AND
SOCIAL SECURITY ADMINISTRATION
FIELD OPERATIONS, REGION II

Respondent

and

Case No. 2-CA-50323

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2369

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practice alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Judge's Decision.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority adopts the Judge's findings,*/ conclusions, and recommended Order dismissing the complaint. The Authority does not view the supervisor's remarks in this case as in any way constituting the kind of expression which is authorized by section 7116(e) of the Statute. The Authority's conclusion is based on the focus and import of the remarks as found by the Administrative Law Judge.

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*/ In response to the General Counsel's contention in its exceptions that the cases relied upon by the Judge were not dispositive, the Authority notes a recent case which involves similar facts and the same determination. Department of the Air Force, 63rd Civil Engineers Squadron, Norton Air Force Base, California, 22 FLRA No. 91 (1986).

ORDER

IT IS ORDERED that the complaint in Case No. 2-CA-50323 be, and it hereby is, dismissed.

Issued, Washington, D.C. October 22, 1986.

J L Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(23 FLRA No. 85)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, AND SOCIAL SECURITY ADMINISTRATION, FIELD OPERATIONS, REGION II

Respondent

and

Case No.: 2-CA-50323

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2369

Charging Party

Richard Matthews
Al Lipovsky
For the Respondent

Susan M. Roche, Esquire
Edgar A. Jones, Esquire
For the General Counsel

Joseph Calafut,
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on August 29, 1985 by the Regional Director for the Federal Labor Relations Authority, New York, N.Y., a hearing was held before the undersigned on October 9, 1985 at New York, N.Y.

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101, et seq. (herein called the Statute). It is based on a First Amended Charge filed on July 18, 1985 by American Federation of Government Employees, AFL-CIO, Local 2369 (herein called the Union) against Department of Health and Human Services, Social Security Administration, and Social Security Administration, Field Operations, Region II (herein collectively called Respondent).

The Complaint alleged, in substance, that on or about May 1, 1983 Respondent's Area V Director, Arne Tornquist, made a derogatory anti-union remark in a telephone conversation to a Union representative who was preparing to represent a grievant in a hearing before said Area Director, all of which allegedly violated Section 7116(a)(1) of the Statute.

Respondent's Answer, dated September 23, 1985, denied the aforesaid allegation as well as the commission of any unfair labor practice.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed which have been duly considered.[1]

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[1] Subsequent to the hearing Respondent filed two motions with the undersigned: (a) Motion, and an amendment thereto, to correct portions of Respondent's post hearing brief, (b) Motion to Strike portions of General Counsel's brief.

The Motion, and its amendment, to correct portions of Respondent's brief constitute spelling and grammatical changes. No objection was interposed thereto. Said Motion is granted as requested.

The Motion to Strike portions of General Counsel's Brief is based on the fact that said brief refers to an article of a collective bargaining agreement; that said agreement was never received in evidence and thus no reference should have been made thereto. Apart from the fact that said article of the agreement was acknowledged by Respondent's witness, the undersigned has relied solely upon matters contained in the record in his decision. The said Motion is denied. See Internal Revenue Service, 16 FLRA No. 119.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein American Federation of Government Employees, AFL-CIO has been the exclusive representative of a consolidated nationwide unit of Respondent's employees, including all employees located in the District and Branch Offices of Social Security Administration in the states of New York and New Jersey, with specified exclusions.

2. At all times material herein the American Federation of Government Employees, AFL-CIO has delegated to the National Council of Social Security Administration Field Operations Locals (Council) authority to act with representatives for collective bargaining on behalf of certain of Respondent's employees, including those employed at the Toms River, New Jersey Branch Office, and Respondent has so recognized the Council for that purpose.

3. At all times material herein the Union has acted as agent for the Council for the purposes of collective bargaining for certain of Respondent's employees, including employees at the Toms River, New Jersey Branch, and Respondent has recognized the Union for that purpose.

4. Both the Social Security Administration and American Federation of Government Employees, AFL-CIO, are parties to an agreement covering a nationwide unit of employees, including employees at the Toms River, New Jersey Branch. Said agreement contains a provision in Article 30, Section 4, as well as Appendix F, Part G, which states as follow:[2]

> "Unless otherwise arranged, union representatives for field offices will be required to request and arrange with appropriate management officials in

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[2] Although General Counsel neglected to introduce the agreement in evidence, the Respondent's Area Director, Arne Tornquist, testified to the existence of the agreement, as well as the quoted provision requiring advance approval of the usage of official time by union representatives.

advance of their usage of official time
by using the SSA-75."

5. Record facts show that on May 1, 1985 Alan H. Cannizzaro was employed as a claims representative at Respondent's Bridgeton, New Jersey Branch. He was the on-site representative for Bridgeton Branch, as well as second vice-president of the Union herein. His duties included handling grievances on behalf of employees, attendance at arbitration hearings, and filing unfair labor practice charges.

6. On May 1, 1985 Cannizzaro went to the Toms River, New Jersey Branch of Respondent to speak with employee Patricia D'Elia. He wanted to investigate a charge brought against D'Elia by management re misusing her title as a government official. Cannizzaro planned to represent the employee in connection with a proposal to suspend her for a day.

7. When the Union representative arrived at the Branch he was met by Joseph E. Lynch, the Operations Supervisor who asked why Cannizzaro was there. The latter explained he wanted to see employee D'Elia; that he was on official time signed by his supervisor. Lynch testified he knew that the Union official represented D'Elia re her proposed suspension, and he was aware that Area Director Arne Tornquist had been assigned to the matter. Since Lynch believed that this Area Director would be the proper official to authorize official time, he telephoned Tornquist to ascertain whether the Director had given approval therefor. Tornquist explained that he did not sanction official time for Cannizzaro's visit, and he told Lynch to put the Union representative on the phone.

8. A telephone conversation ensued between Tornquist and Cannizzaro re the purpose of the latter's visit to the Toms River Branch.[3] The Union official told the Director he had an approved SSA-75[4] which was signed by his super-

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[3] Several versions of this conversation were testified to by the witnesses. The facts set forth herein represent the credited version thereof.

[4] Approval of this form is official authorization to represent someone at another office or location.

visor. Tornquist said it had to be sanctioned by the hearing official[5/] before the supervisor could approve it. Cannizzaro, who was upset at the confrontation, said he didn't give a shit, he would do as he pleased. Upon rhetorically asking Cannizzaro if the Union representative considered himself real big in the Union now, Tornquist said that Cannizzaro was just a little "union shit". Cannizzaro replied he didn't appreciate being called such a name, and he then called the Area Director a "fat fuck".

After being asked by Tornquist if he intended to file an unfair labor practice against the Director, Cannizzaro said he probably would do so. Tornquist replied that the Union official should go ahead and do so; that Cannizzaro had not made one stick yet. Cannizzaro stated he could leave and return later but it would just be a waste of time and money; that he gets paid for filing grievances and unfair labor practices. The Area Director told the Union representative he was a waste to the agency and interfered with its mission, but that Cannizzaro should stay there and "do what you have to do - meet with the employee and leave nice and early."

9. After the telephone conversation Cannizzaro met with Patricia D'Elia. He explained what occurred and asked her if she wanted him to withdraw from the case. D'Elia stated she did not want Cannizzaro to withdraw.

10. Thereafter Cannizzaro wrote letters to Paul Dudak, Area Director IV, and Alex Bussey, Assistant Regional Commissioner. He mentioned what transpired during his conversation with Tornquist, as well as the fact that the latter called him a "little union shit". Cannizzaro complained about Tornquist's behavior and asked that another person be appointed to hear D'Elia's grievance so the employee could get a fair and unbiased decision. A reply from Dudak stated that management makes its own determination and would exercise its authority on this issue.

Conclusions

The simple issue herein is whether Area Director's remarks to Union representative Cannizzaro, during a

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[5/] Tornquist was the third-step grievance official who would ultimately act as the hearing officer re D'Elia's grievance.

telephone conversation on May 1, 1985, were coercive in nature and violated Section 7116(a)(1) of the Statute.

General Counsel contends that Cannizzaro was engaged in protected activity at the time,[6] that, although no explicit threat was made by Tornquist, his comments implied that the Union official's right to conduct his duties was "under attack"; that the statements interfered with Cannizzaro's right to conduct his legitimate representational activities.

The Authority has had occasion to consider several cases wherein statements by supervisors were made to employees which were allegedly coercive in nature. In determining if remarks by management interfered with protected activity, and tended to coerce, the test is whether an employee could reasonably infer coercion from the statement by a supervisor. Federal Mediation and Conciliation Service, 9 FLRA No. 31. Such determination is not based on the employer's intention or the perception of the involved employee - either of which may properly be characterized as subjective in nature.

General Counsel has alluded to several cases in support of its position that Tornquist's statements to Cannizzaro constituted interference with the latter's functions as a union representative. In particular, reference is made to U.S. Army Military Traffic Management Command, Eastern Area, Bayonne, N.J., 16 FLRA No. 123; Social Security Administration, Baltimore, Maryland, 14 FLRA No. 80; Department of the Treasury, Internal Revenue Service, Louisville District, 11 FLRA No. 64.

The undersigned has reviewed the cited cases but is not persuaded that they are determinative in deciding the matter at hand.

In U.S. Army Military Traffic Management Command, supra, a union steward, who had received a formal reprimand for failing to work on assignments, requested additional official time to prepare his reply. The deputy, to whom he made the request, asked "why don't you stop this Union nonsense and do your job like you're supposed to do instead of like you were in 82"? It was held that this implied disapproval of the steward's unionism and chilled the exercise of his right to join or assist a labor organization. In the case at bar the Area Director was concerned with the failure of Cannizzaro to obtain his prior approval to confer with the grievant. He did not attempt to thwart the Union representative from speaking to D'Elia, nor did he suggest that Cannizzaro should cease his representational functions. I do not conclude that, as in the cited case, such "chilling" effect resulted from Tornquist's calling the representative a "little union shit" or that the latter was a waste to the agency.

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[6] Cannizzaro's intercession on behalf of employee D'Elia, and his effort to discuss her grievance as a Union representative, are clearly protected activities. Moreover, a union representative is entitled to freedom to process grievances without harassment. However, the right is not absolute. See Philadelphia Naval Shipyard, 4 FLRA No. 38.

It was concluded in the Social Security Administration case, supra, that a supervisor's threat to throw the union representative out of his office, and his preventing a grievance meeting between the representative and an employee, was violative of 7116(a)(1). The case at bar presents a different situation. Tornquist did not prevent the meeting between Cannizzaro and D'Elia, nor did he interfere with the right of the Union representative to confer with the employee. In the cited case the management official refused to verify the fact that the union agent had already received permission to see the grievant. Moreover, the record showed that the conduct displayed by management was not an isolated incident but part of a larger problem in the office.

In the Internal Revenue Service, Louisville District case, supra, the union steward was criticized by a chief of one of the employer's division for calling the personnel office on behalf of an employee.[7] The Chief upraided the steward, stating the latter was "out of line"; that he sticks his nose into things and causes trouble - that he had done it again. These remarks, it was held, would be interpreted by a reasonable employee to constitute management hostility toward the steward's contacting the personnel office on behalf of an employee and toward his representational activities. I view the aforesaid factual situation far removed from the one at bar. The management official in the cited case evinced a clear hostility to the efforts of the steward to engage in his union duties and act on behalf of an employee who felt aggrieved. Moreover, he admonished the steward to refrain from getting involved in such representation. While Tornquist, in the instant case, was upset that Cannizzaro had not solicited his approval beforehand, the record does not support the conclusion that the Director declared or implied that Cannizzaro should abstain from pursuing his representational duties.

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[7] The employee, working at location A, had been selected to work at location B. The steward was attempting to intercede for the employee in an effort to have the job itself moved to location A so the employee would not be required to move.

It is urged herein that calling Cannizzaro a "little union shit" was anti-union in nature, and that the union official would necessarily think twice before deciding to continue as D'Elia's representative. This remark, however, was not made in the context of open hostility to the Union. Neither was it made, in my opinion, in a deliberate attempt to discourage Cannizzaro from continuing his representational duties. The statement flowed from Tornquist's apparent slight at not being contacted before Cannizzaro went to Toms River to see the grievant. As such, the remark - made solely to the Union official - disparaged the latter as a private conversation, and it may well be deemed an expression of Tornquist's personal views rather than a position of agency management. The language used by the Area Director, as well as the cursing of the latter by Cannizzaro, may well have exceeded the bounds of proper expression. However, passions were seemingly high, and, in respect to the statement by Tornquist, I conclude any taint of disparagement did not justify the conclusion that a reasonable man would be coerced into discontinuing his representation of an aggrieved employee. In sum, it is concluded that the Area Director's remarks did not constitute interference, restraint or coercion and were not violative of Section 7116(a)(1) of the Statute. See Army and Air Force Exchange Service (AAFES), Ft. Carson, Colorado, 9 FLRA No. 69; Oklahoma City Air Logistics Center (AFLC), Tinker Air Force Base, Oklahoma, 6 FLRA No. 32.

It is therefore recommended that the Authority issue the following Order:

ORDER

It is hereby Ordered that the Complaint in Case No. 2-CA-50323 be, and the same hereby is, dismissed.

William Naimark

WILLIAM NAIMARK
Administrative Law Judge

Dated: February 19, 1986
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

COLUMBUS AIR FORCE BASE EXCHANGE
COLUMBUS AIR FORCE BASE, MISSISSIPPI

Activity

and

Case No. 4-RO-50034

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES

Labor Organization

ORDER DENYING APPLICATION FOR REVIEW

On September 5, 1986, the Columbus Air Force Base Exchange, Columbus Air Force Base, Mississippi (the Activity), filed a timely application for review, pursuant to section 2422.17(a) of the Authority's Rules and Regulations, seeking to set aside the Regional Director's Decision and Order on Objections in the above-named case. The Regional Director set aside an election and directed that another be conducted because she concluded that objectionable conduct occurred on the part of the Activity which improperly affected the results of the election. The National Association of Government Employees (NAGE) filed an opposition to this application for review. In its application for review, the Activity contends that compelling reasons exist within the meaning of section 2422.17(c) of the Authority's Rules and Regulations for granting this application.

The Authority has consistently held that during the course of a representation campaign, an activity must assume a neutral posture and any statements issued by the Activity must conform to the requirements of section 7116(e) of the Statute. United States Department of Justice, United States Immigration and Naturalization Service, 9 FLRA 253 (1982); Department of the Air Force, Air Force Plant Representative Office, Detachment 27, Forth Worth, Texas, 5 FLRA 492 (1981).

Upon consideration of the Activity's application for review, including its supporting arguments, the Authority concludes that no compelling reason exists for granting the application. Rather, the application expresses mere disagreement with the Regional Director's findings, which are based on precedent and have not been shown to be clearly erroneous or to have prejudicially affected the rights of any party.

Accordingly, pursuant to section 2422.17(f)(3) of the Authority's Rules and Regulations IT IS ORDERED that the application for review of the Regional Director's Decision and Order on Objections be, and it hereby is, denied.

Issued, Washington, D.C., October 22, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION

Respondent

and Case No. 3-CA-30727

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL COUNCIL OF VA LOCALS

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority, in accordance with section 2429.1(a) of the Authority's Rules and Regulations, based upon a stipulation entered into by the Respondent, the Charging Party and the General Counsel. The case involves an alleged violation of section 7116(a)(1) and (6) of the Federal Service Labor-Management Relations Statute (the Statute) when the Respondent notified the Charging Party and the Federal Service Impasses Panel (the Panel) that it would not comply with the Arbitrator's Opinion and Decision in Veterans Administration, Washington, D.C. and National Council of VA Locals, AFGE, 83 FSIP 46, concerning the payment of travel and per diem expenses.

II. Background

During ground rules negotiations for the parties' first master collective bargaining agreement, the Charging Party requested the assistance of the Panel in resolving an impasse, principally on the matter of payment for travel and per diem expenses. There was some disagreement among the parties as to whether the matter was properly before the Panel. The Respondent argued that the Charging Party's proposals regarding travel and per diem expenses were not negotiable and, also, that the issue should be resolved by the Authority, not the Panel. The parties were subsequently able to complete negotiations on the ground rules except for the matter of travel and per diem expenses. Thereafter, the

Panel referred these issues to its Executive Director for arbitration. The Executive Director was given "the authority to mediate . . . [and to] dispose of [any remaining unresolved issues] by (1) issuing a decision resolving some or all of the issues and (2) declining to hear some or all of the issues until such time as any threshold negotiability issues are resolved in an appropriate forum." On July 15, 1983, the Executive Director issued his "Arbitrator's Opinion and Decision" in which he ordered the Respondent to adopt the Charging Party's proposals providing for reimbursement of travel and per diem expenses to employees engaged in preparation for bargaining as well as actual negotiations.[1] Following receipt of the Arbitrator's Opinion and Decision, the Respondent informed the Panel and the Charging Party that it would not comply with the decision. The Respondent also petitioned the Panel to withdraw the Opinion and Decision following issuance of the United States Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms (BATF) v. Federal Labor Relations Authority, 464 U.S. 89 (1983), which the Panel declined to do. A petition for reconsideration filed by the Respondent was similarly denied by the Panel. During the ensuing negotiations between the parties for their master agreement, the parties stipulated that the Charging Party paid approximately $50,000 for travel and per diem expenses to its union/employee negotiators, which payment otherwise would have come from the Respondent's appropriated funds.

III. Positions of the Parties

The Respondent moves for dismissal of the unfair labor practice allegation on the basis that the issues raised involve negotiability questions over which the Panel does not have jurisdiction. It argues that both the Authority and the Panel recognized that a legitimate negotiability question was involved because of actions taken in other, unrelated proceedings involving the negotiability of travel and per diem payments. The Respondent also raises certain arguments regarding the cost of travel and per diem payments -- specifically, that such payments are inconsistent with the agency's statutory right to determine its budget and that there is no statutory authorization for such expenditures.

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[1] Other issues were resolved during the mediation phase of the proceeding and are not at issue in this case.

The Charging Party argues generally that payment of travel and per diem expenses is a negotiable condition of employment, that the Panel properly asserted jurisdiction over the impasse, and consequently that the failure to comply with the Arbitrator's Opinion and Decision violated the Statute.

The General Counsel argues that the failure and refusal to comply with the express provisions of section 7119(c) of the Statute[2] constituted a failure and refusal to cooperate in impasse decisions in violation of section 7116(a)(1) and (6) of the Statute. Both the General Counsel and the Charging Party request that the Authority order the Respondent to comply with the Arbitrator's Opinion and Decision.

The General Counsel also argues that because the Arbitrator's Opinion and Decision resulted from a Panel-directed arbitration proceeding and nothing contained in the parties' stipulation indicated that timely exceptions to the award had been filed under section 7122(a) of the Statute, the award became final and binding within the meaning of section 7122(b).[3] The failure to abide by a final and binding arbitration award was alleged to constitute a violation of section 7116(a)(1) and (6) of the Statute as well. The Respondent objected to this allegation and filed a motion to strike the argument contained in the General Counsel's brief on the basis that the allegation was not contained in the amended charge against the Respondent, was not alleged in the complaint, and was not referenced in the parties' stipulation of facts. The General Counsel opposed the motion to strike on the grounds that the arguments are legal in nature and rely solely on the facts contained in the stipulation.

IV. Analysis

A. Type of Proceeding

As a preliminary matter, the Authority must decide whether the Arbitrator's Opinion and Decision in 83 FSIP 46 is a Panel decision within the meaning of section 7119 of the Statute, as the parties have characterized it, or whether it is an arbitration award resulting from Panel-directed interest arbitration. For the reasons which follow, we find that it is the latter.

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[2] Section 7119(c) provides that any final action of the Panel "shall be binding on such parties during the term of the agreement, unless the parties agree otherwise."

[3] Section 7122(b) of the Statute provides that an arbitration award shall be final and binding unless exceptions are filed within a prescribed time period, and that an agency shall take the actions required by an award that has become final and binding.

As noted above, after receiving the Charging Party's request for assistance, the Panel referred certain unresolved issues to its Executive Director for arbitration. Specifically, the arbitrator was given the authority to first mediate the issues and, failing resolution on that basis, to dispose of any issues that remained by either issuing a decision or declining to hear the issues until any threshold negotiability issues were resolved in an appropriate forum. On the basis of his authority, the arbitrator issued an Arbitrator's Opinion and Decision in which he directed the parties to adopt the Charging Party's proposals relating to the payment of various travel and per diem expenses. In our view, this decision constituted an arbitration award rendered in an interest arbitration proceeding to which the parties had been directed by the Panel. This is evident from both the Panel's communications to the parties referring the matter to mediation and arbitration and from the language of the Opinion and Decision itself. While the parties may have viewed the decision in 83 FSIP 46 as a Panel decision, we find that the Opinion and Decision was an interest arbitration award under section 7122 of the Statute and not a "final action" of the Panel within the meaning of section 7119(c)(5)(C) of the Statute.[4/]

B. Failure to Comply - Section 7116(a)(1) and (6) Violation

In United States Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 15 FLRA 151, 154 (1984), aff'd sub nom. Department of the Air Force v.

[4/] See Department of the Air Force, Flight Test Center, Edwards Air Force Base, California and Interdepartmental Local 3854, American Federation of Government Employees, AFL-CIO, 21 FLRA No. 61 (1986), in which the Authority determined, among other things, that an arbitrator's opinion and decision resulting from Panel-directed interest arbitration was an arbitration award and not a final action of the Panel under section 7119 of the Statute. Any argument the Respondent wished to raise concerning the Panel's jurisdiction in this matter could have been raised in exceptions to the award filed under section 7122 of the Statute.

Federal Labor Relations Authority, 775 F.2d 727 (6th Cir. 1985), the Authority concluded that a failure to comply with a final and binding interest arbitration award which resulted from the Panel's granting of the parties' request to resolve their dispute through the use of interest arbitration was not only inconsistent with the requirements of section 7122(b) and therefore a violation of section 7116(a)(1) and (8) of the Statute, but also constituted a failure to cooperate with impasse procedures and decisions in violation of section 7116(a)(1) and (6) of the Statute. In this case, the Panel directed the parties to interest arbitration to resolve the impasse that arose in their negotiations and an award was subsequently issued directing the parties to adopt certain proposals regarding the payment of travel and per diem expenses. We find that the Respondent's conceded failure to comply with the award rendered as a result of this process violated section 7116(a)(1) and (6) of the Statute because the Respondent failed to cooperate in Panel procedures.

C. Motion to Strike

The Respondent filed a motion to strike the General Counsel's argument, first articulated in its post-stipulation brief to the Authority, that the Respondent's failure to comply with a final and binding arbitration award also constituted a violation of section 7116(a)(1) and (6) of the Statute. As we noted in connection with the Wright-Patterson case, a failure to comply with an interest arbitration award which has become final and binding in the absence of timely filed exceptions is a violation of section 7116(a)(1) and (8) of the Statute. In the complaint in this case, the General Counsel did not allege a violation of section 7116(a)(1) and (8) of the Statute based on the failure to comply with an arbitration award. Therefore, to the extent that the General Counsel is now attempting to argue a new violation of the Statute, the motion to strike is granted. On the other hand, to the extent that the General Counsel is alleging that the failure to comply with the award constitutes noncompliance with the requirements of section 7119 of the Statute, we find that such conduct was properly alleged as a section 7116(a)(1) and (6) violation because it demonstrates a failure to cooperate with Panel procedures. Therefore, to this extent, the motion to strike is denied.[5]

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[5] The parties' mischaracterization of the arbitration award may have resulted from the Panel's and the arbitrator's procedures. The arbitration award was

(Continued)

V. Remedy

To remedy the unfair labor practice conduct, the Authority will order the Respondent to comply with the Arbitrator's Opinion and Decision in 83 FSIP 46, and to give it retroactive effect. See Wright-Patterson. As the arbitrator directed the parties to adopt proposals requiring the payment of travel and per diem expenses, our order requires that the Respondent make such payments. In this connection, the stipulated record indicates that it was the Charging Party that made payments the Respondent otherwise would have made from its appropriated funds. Therefore, consistent with the Authority's decision in, for example, Department of the Treasury, Internal Revenue Service, Columbia District, Columbia, South Carolina, 22 FLRA No. 28 (1986), petition for review filed sub nom. Department of the Treasury, Internal Revenue Service, Columbia District, Columbia, South Carolina v. FLRA, No. 85-1467 (D.C. Cir. Aug. 22, 1986), we will further order the Respondent to make whole the Charging Party for the expenses it incurred in paying the travel and per diem expenses of bargaining unit employees who acted as its negotiators while engaged in preparation for bargaining as well as actual negotiations over the master agreement. Additionally, if there are any bargaining unit employees who either did not receive payments to which they were entitled or were not compensated fully for such expenses, the Respondent also will be ordered to reimburse them for the travel and per diem expenses they incurred upon their submission of properly documented claims for such payments. The payments that are here being ordered must be consistent with law and regulation, including the Federal Travel Regulations.

(Continued)

forwarded to the parties with a cover letter on Panel letterhead signed by Howard Solomon as "Executive Director." The first page of the Arbitrator's Opinion and Decision contains the heading "Before the Federal Service Impasses Panel," and Mr. Solomon signed the Opinion and Decision as "Executive Director and Arbitrator." Further, the signature page of the decision contains the phrase "By direction of the Panel." A clearer explanation of the Panel's procedures might have avoided the parties' reference to the arbitration award as a Panel decision.

VI. Conclusion

We find that the Respondent's failure to comply with the Arbitrator's Opinion and Decision in Case No. 83 FSIP 46 constituted a failure to cooperate in impasse procedures in violation of section 7116(a)(1) and (6) of the Statute. Therefore, we shall order the Respondent to comply with the Opinion and Decision and pay travel and per diem expenses as outlined above.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is ordered that the Veterans Administration shall:

1. Cease and desist from:

(a) Failing and refusing to cooperate in impasse procedures by refusing to comply with the Arbitrator's Opinion and Decision in Case No. 83 FSIP 46.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Comply with the Arbitrator's Opinion and Decision in Case No. 83 FSIP 46.

(b) Make the American Federation of Government Employees, National Council of VA Locals whole for the costs it incurred in paying the travel and per diem expenses of bargaining unit employees who acted as its negotiators while engaged in preparation for bargaining as well as actual negotiations over the master agreement, for which the employees otherwise would have been reimbursed by the Respondent.

(c) Pay travel and per diem expenses, consistent with law and regulation, including the Federal Travel Regulations, to all bargaining unit employees who submit or previously submitted appropriate claims for such payments in connection with preparation for bargaining as well as actual negotiations over the master agreement, to the extent that such expenses have not been reimbursed by the American Federation of Government Employees, National Council of VA Locals.

(d) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Administrator and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with it.

Issued, Washington, D.C., October 22, 1986.

Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(23 FLRA No. 87)

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to cooperate in impasse procedures by refusing to comply with the Arbitrator's Opinion and Decision in Case No. 83 FSIP 46.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL comply with the Arbitrator's Opinion and Decision in Case No. 83 FSIP 46.

WE WILL make the American Federation of Government Employees, National Council of VA Locals whole for the costs it incurred in paying the travel and per diem expenses of bargaining unit employees who acted as its negotiators while engaged in preparation for bargaining as well as actual negotiations over the master agreement, for which the employees otherwise would have been reimbursed by us.

WE WILL pay travel and per diem expenses, consistent with law and regulation, including the Federal Travel Regulations, to all bargaining unit employees who submit or previously submitted appropriate claims for such payments in connection with preparation for bargaining as well as actual negotiations over the master agreement, to the extent that such expenses have not been reimbursed by the American Federation of Government Employees, National Council of VA Locals.

____
(Activity)

Dated:____________________ By:____________________________
(Signature) (Title)

(23 FLRA No. 87)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, Federal Labor Relations Authority, whose address is: 1111 18th Street, Room 700, P.O. Box 33758, Washington, D.C. 20033-0758 and whose telephone number is: (202) 653-8500.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. NAVAL ORDNANCE STATION

Activity

and Case No. 0-AR-1123

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS
LOCAL LODGE 830

Union

DECISION

I. STATEMENT OF THE CASE

This case is before the Authority on exceptions to the award of Arbitrator W. Thomas Mulhall filed by the Department of the Navy (the Agency) under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

A grievance was filed and submitted to arbitration on the issue of whether the Activity violated the parties' collective bargaining agreement by its assignment of overtime. The grievant was a general purpose welder and the overtime to which he claimed entitlement had been assigned to two electron beam welders because the overtime work was scheduled to be done on electron beam welding equipment. Specifically, one of the electron beam welders was assigned to operate the equipment and the other was assigned to assist. At arbitration the Activity explained that the grievant was not considered for the disputed overtime assignment because as a general purpose welder he was not qualified to perform the electron beam welding work. The Union disputed the Activity's determination that the employee assigned to assist the primary welder must also be a qualified electron beam welder. The Union maintained that the assistant performed duties for which the grievant was entirely qualified and argued that therefore the grievant was entitled to have been offered the disputed overtime assignment.

The Arbitrator agreed with the Union. He found that the record did not indicate that the duties of the assistant were of the same specialized nature required of the primary electron beam welder. To the contrary he found that the work performed by the assistant was completely within the skills of the grievant and that the grievant was qualified to perform that work. The Arbitrator ruled that under the parties' collective bargaining agreement provisions on the distribution of overtime, management was obligated to have offered the overtime work of assisting the operator of the electron beam welding equipment to the grievant. The Arbitrator concluded that the grievant was wrongfully deprived of the assignment. Accordingly, as his award, the Arbitrator sustained the grievance and awarded the grievant 8 hours of overtime pay.

III. EXCEPTIONS

As one of its exceptions, the Agency contends that the award is contrary to management's right to assign work in accordance with section 7106(a)(2)(3) of the Statute. Specifically, the Agency argues that the award substitutes the judgment of the Arbitrator for that of management in determining the qualifications necessary to perform certain work and in determining whether the grievant possessed those qualifications.

IV. ANALYSIS AND CONCLUSIONS

We agree with the Agency. In *United States Marine Corps, Marine Corps Logistics Base, Albany, Georgia and American Federation of Government Employees, Local 2317*, 23 FLRA No. 52 (1986), in which the arbitrator found, contrary to the determination of management, that the grievant had the skills necessary to perform the overtime work in dispute and ordered that the grievant be assigned such work, we concluded that the award was contrary to management's right to assign work under section 7106(a)(2)(B) of the Statute. More specifically, we found that the arbitrator had negated the exercise by management of the rights encompassed by section 7106(a)(2)(B) to establish qualifications and to determine whether particular employees meet those qualifications and, therefore, we set aside the award.

In this case we similarly conclude for the reasons set forth in Marine Corps Logistics Base, Albany, Georgia, that the award is contrary to management's right to assign work under section 7106(a)(2)(B). The grievant was not considered for the disputed overtime assignment because management had determined that he was not qualified. Thus, the Arbitrator in this case has negated the exercise by management of the rights to establish qualifications and to determine whether particular employees meet those qualifications. The Arbitrator has not merely enforced a procedure of the parties' collective bargaining agreement by which employees previously judged by management to be equally qualified will be selected to perform certain work. Instead, he has enforced the agreement to improperly interfere with management's right to assign work in accordance with section 7106(a)(2)(B) of the Statute.

V. DECISION

Accordingly, for these reasons, the Arbitrator's award is set aside.*/

Issued, Washington, D.C., October 22, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In view of this decision, it is not necessary that we address the Agency's other exceptions.

23 FLRA No. 89

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WICHITA DISTRICT, WICHITA, KANSAS

Respondent

and

Case No. 7-CA-30514
(17 FLRA 485)

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

DECISION AND ORDER ON REMAND

On April 15, 1985, the Authority issued its Decision and Order in the above-entitled proceeding. The Authority found that the Respondent had not committed an unfair labor practice by disciplining two employees for disclosure of confidential taxpayer information to non-employee union lawyers in the course of preparation for a grievance proceeding. The Authority, in agreement with the Administrative Law Judge, found that the disclosure by the two employees violated section 6103 of the Internal Revenue Code, 26 U.S.C. § 6103 (1982), and pertinent Internal Revenue Service regulations, because the employees had not obtained the requisite authorization for such disclosures. The Authority determined, therefore, that the Respondent had not violated section 7116(a)(1) and (2) of the Statute*/

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*/ Section 7116(a)(1) and (2) provides:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment[.]

by disciplining the two employees. Department of the Treasury, Internal Revenue Service, Wichita District, Wichita, Kansas, 17 FLRA 485 (1985).

Thereafter, on May 23, 1986, the U.S. Court of Appeals for the District of Columbia Circuit reversed the Authority's Decision and remanded the matter to the Authority for proceedings consistent with the court's opinion. National Treasury Employees Union v. FLRA, 791 F.2d 183 (D.C. Cir. 1986). The Court agreed with the Authority that 26 U.S.C. § 6103 prohibits the disclosure of confidential taxpayer information by employees for personnel matters absent appropriate authorization for disclosure. However, the court determined that in the "unique circumstances" present in this case, the two employees did not have fair notice that the disclosure to their union lawyers was unlawful. 791 F.2d at 184. The court noted that the employees submitted a written request to their supervisor for information relevant to an employee grievance. Specifically, employees Bates and Moore requested copies of the Revenue Officer Dailies, or daily work records, for four employees, including Bates and Moore. The court stated that the supervisor, who was not authorized to permit disclosure of taxpayer information, essentially told the two employees to disclose their own dailies to each other, without obtaining appropriate authorization. Id. at 187. This behavior, along with prevalent uncertainty about the process for obtaining authorization for disclosure of taxpayer information in connection with an employee grievance, led the court to the conclusion that the employees did not have adequate notice that they lacked sufficient authorization for their subsequent disclosure of their dailies to their union lawyers. Id. In these circumstances, the court determined that the Respondent committed an unfair labor practice by orally admonishing the employees for the disclosure to their union lawyers.

The Authority accepts the court's opinion as the law of the case and, consistent with that opinion, shall issue an order to remedy the unfair labor practice. The court suggested (791 F.2d at 188-89 n.11) that a possible remedial provision would be a requirement that the Respondent post signs explaining the prohibition in 26 U.S.C. § 6103 on disclosure of taxpayer information, and the procedure for obtaining authorization for disclosure. While the Authority's Order does not contain such a provision, we note that nothing in this Decision and Order precludes the Respondent from notifying its employees in an appropriate manner of the prohibition on unauthorized disclosure of taxpayer information, and of the procedure for obtaining proper authorization for such disclosure. We encourage the Respondent to do so.

We further note that the record discloses that employee Moore's supervisor refused to recommend Moore for a high quality step increase because of his disclosure of taxpayer information to the union lawyers. 17 FLRA at 509. See also NTEU v. FLRA, 791 F.2d at 185 n.3. Consistent with the court's opinion, our Order requires the Respondent to recommend Moore for a high quality step increase and to consider and act upon the recommendation without regard to his disclosure to the union lawyers, since he lacked adequate notice that he did not have authorization to make the disclosure.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Department of the Treasury, Internal Revenue Service, Wichita District, Wichita, Kansas, shall:

1. Cease and desist from:

(a) Disciplining employees for unauthorized disclosure of confidential taxpayer information to non-employee attorneys in connection with an employee grievance, where the employees lack adequate notice that they have not obtained sufficient authorization to disclose the information.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Recommend employee Moore for a high quality step increase, and consider and act upon the recommendation without regard to his disclosure of taxpayer information in connection with an employee grievance, since he lacked adequate notice that he did not have sufficient authorization to make the disclosure.

(b) Post at its facility where employees in the bargaining unit are located copies of the attached Notice on forms to be furnished by the Federal Labor Relations

Authority. Upon receipt of such forms, they shall be signed by an appropriate official of the Respondent, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., October 22, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(23 FLRA No. 89)

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discipline employees for unauthorized disclosure of confidential taxpayer information to non-employee attorneys in connection with an employee grievance, where the employees lack adequate notice that they have not obtained sufficient authorization to disclose the information.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL recommend employee Moore for a high quality step increase, and will consider and act upon the recommendation without regard to his disclosure of taxpayer information in connection with an employee grievance, since he lacked adequate notice that he did not have sufficient authorization to make the disclosure.

____
(Agency or Activity)

Dated: ______________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director for Region VII, Federal Labor Relations Authority, whose address is: 535 16th Street, Suite 310, Denver, Colorado 80202 and whose telephone number is: (303) 837-5224.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, COUNCIL OF
LOCALS NO. 214

Union

and

Case No. 0-NG-1002
19 FLRA No. 23

DEPARTMENT OF THE AIR FORCE
AIR FORCE LOGISTICS COMMAND
WRIGHT-PATTERSON AIR FORCE BASE
OHIO

Agency

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to a remand from the United States Court of Appeals for the District of Columbia Circuit. AFGE, AFL-CIO, Council of Locals No. 214 v. FLRA, No. 85-1500 (D.C. Cir. August 26, 1986), reversing and remanding the Authority's decision in American Federation of Government Employees, AFL-CIO, National Council Locals No, 214 and Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 19 FLRA No. 23 (July 22, 1985).

On October 15, 1986, the Agency noting that the Air Force Logistics Command and AFGE Council No. 214 have signed a Memorandum of Agreement finalizing their renegotiated Master Labor Agreement, filed a request with the Authority asking to withdraw its allegation of nonnegotiability.

Inasmuch as the Agency has withdrawn its allegation of nonnegotiability concerning the Union's proposal, there is no longer an issue as to whether the proposal in this case is within the parties' duty to bargain under the Statute. See e.g. International Association of Machinists and Aerospace Workers, Lodge 2424 and Department of the Army, Aberdeen Proving Ground, Maryland, 23 FLRA No. 42 (1986); and American Federation of Government Employees, AFL-CIO, Local 1900 and Department of the Army, Headquarters, Fort Devens, Massachusetts, 21 FLRA No.

116 (1986). Moreover, the Authority has been advised telephonically by AFGE that no issue in the case remains outstanding as the parties have signed a Memorandum of Agreement which: (1) incorporates into their renegotiated Master Labor Agreement the proposal which had been at issue in AFGE's petition for review; (2) and resolves all other related issues.

Accordingly, and apart from other considerations, the petition for review in this case is hereby dismissed.

For the Authority.

Issued, Washington, D.C., October 24, 1986

Harold D. Kessler
Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES UNION

Union

and

Case No. 0-NG-934

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The issue presented concerns the negotiability of the following provision contained in the parties' locally executed agreement which was disapproved during review of that agreement by the Agency head under section 7114(c) of the Statute:[1]

> Existing crediting plans will be disclosed to the union upon request.

II. Positions of the Parties

The Agency contends that subchapters S5-3 and S6-1 of Federal Personnel Manual (FPM) Supplement 335-1 and FPM Letter 335-15 do not permit a blanket disclosure of crediting plans but require agencies to make a case-by-case determination as to whether releasing its plans would give candidates an unfair advantage or compromise the utility of its selection process. The Agency claims that disclosure of its crediting plans would reduce their utility by (1) making it difficult for the Agency to verify nonquantitative information presented by applicants having access to the plans, and (2) resulting in applicants creating similar applications which would generate similar scores. It argues that these sections of the FPM are Government-wide regulations within the meaning of section 7117(a)(1). The Agency claims that the provision would conflict with the cited regulations and is, therefore, outside the duty to bargain.

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[1] The Agency withdrew its disapproval of Article 12, Sections 1A, 4A, 6C and 6D; Article 15; Article 16, Sections 2, 3, 8, 10A, 10C, 16A, and 17A; Article 17, Section 13; Article 20, Section 7; and Article 24, Section 6C. The Union withdrew its appeal as to the Agency's disapproval of Article 20, Section 9E; Article 22, Section 9; and Article 24, Sections 6A and 6B. Consequently, these provisions will not be considered further here.

The Union contends that the release of crediting plans pursuant to the disputed provision will not result in an unfair advantage to any candidate or compromise the utility of the selection procedure. The Union argues that the provision is, therefore, not inconsistent with the FPM and is within the duty to bargain.

III. Analysis and Conclusion

The Union's proposal would require the Agency to disclose any existing crediting plan to the Union upon request. In National Treasury Employees Union and NTEU Chapters 153, 161 and 183 and U.S. Customs Service, Region II, 11 FLRA 209, 212-13 (1983), reversed on other grounds sub nom. U.S. Customs Service, Region II v. FLRA, 739 F.2d 829 (2d Cir. 1984),[2] the Authority held that FPM Supplement 335-1, subchapter S6, and

---

[2] In U.S. Customs Service, Region II, the Second Circuit reversed the Authority's holding that the content of the crediting plans at issue in that case was within the duty to bargain. In Department of the Treasury, U.S. Customs Service v. Federal Labor Relations Authority, 762 F.2d 1119 (D.C. Cir. 1985), reversing National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, Washington, D.C., 11 FLRA 247 (1983), the D.C. Circuit reached the same result as the Second Circuit regarding the negotiability of the content of crediting plans but for different reasons. In The Montana Air Chapter of Association of Civilian Technicians and U.S. Department of the Air Force, Montana Air National Guard, 19 FLRA No. 112 (1985), the Authority concurred in the result reached by both courts as to the negotiability of the content of crediting plans, but adopted the rationale of the D.C. Circuit. However, neither the decision of the Second Circuit nor the D.C. Circuit addressed the negotiability of the *disclosure* of crediting plans.

FPM Letter 335-15, which revised FPM Supplement 335-1, subchapter S5, authorize release of crediting plans where the release would not create any unfair advantage to some candidates or compromise the utility of the selection process. However, a determination as to whether release of crediting plans would create an unfair advantage or compromise the utility of the selection process depends upon the particular circumstances present and, consequently, should be made by an agency on a case-by-case basis. Although subchapter S5-3 of FPM Supplement 335-1 generally encourages agencies to provide candidates for selection with information about the job requirements and rating procedures used to evaluate them, subsection (c) of that subchapter provides:

> Crediting plans and rating procedures for the evaluation of candidates' experiences should not be released as a means of providing information about job requirements if, in the agency's view, such release would undermine the fairness and validity of the selection procedure. In such instances, information may be extracted from crediting plans to meet the requirements of subparagraph a, above.

Additionally, FPM Letter 335-15 explains that FPM Supplement 335-1 is intended to allow agencies to provide candidates with information about characteristics to be measured and about the measurement process through "vacancy announcements or through making available crediting plans or related information which will not compromise requirements for security and control." However, the FPM Letter further provides that "[a]n explicit decision is necessary to determine whether crediting plans and related rating information are releasable."

Nothing in the language of the Union's proposal would limit the Agency's obligation to comply with a Union request for disclosure of crediting plans where such disclosure would be contrary to the requirements of the FPM. Since the Union's proposal would authorize a blanket disclosure of existing Agency crediting plans without regard to whether release of those plans would undermine the fairness and validity of the selection procedure, we find that the proposal is inconsistent with subchapter S5-3(c) of FPM Supplement 335-1.

Next, we must determine whether FPM Supplement 335-1, subchapter S5-3 constitutes a "Government-wide rule or regulation" within the meaning of section 7117(a)(1) of the

Statute which would bar negotiations on a conflicting union proposal. In U.S. Customs Service, Washington, D.C., discussed in footnote 2, the Authority found FPM Chapter 335, subchapter 1-4, in which the Office of Personnel Management (OPM) set forth its determination of the policies necessary to ensure that agency promotion procedures are based on merit, to be a Government-wide rule or regulation.[3] Requirement 3 of subchapter 1-4 provides that "[m]ethods of evaluation for promotion and placement . . . must be consistent with instructions in FPM Supplement 335-1." FPM Supplement 335-1 contains instructions to agencies from OPM concerning the "use" of evaluation procedures in accordance with Requirement 3 of FPM Chapter 335, subchapter 1-4. See FPM Supplement 335-1, subchapter S1-1. Also, Requirement 3 is generally applicable to the Federal civilian work force in that it applies to "all General Schedule and Wage Grade jobs." See FPM Letter 335-15. Accordingly, we find that subchapter S5-3 of FPM Supplement 335-1 constitutes a Government-wide rule or regulation within the meaning of section 7117(a)(1) of the Statute. Since the Union's proposal is inconsistent with subchapter S5-3, it is outside the duty to bargain.[4]

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[3] The D.C. Circuit's decision, which reversed the Authority's holding in U.S. Customs Service, Washington D.C. as to the negotiability of the content of crediting plans, did not disagree with the Authority's finding that FPM Chapter 335, subchapter 1-4 is a Government-wide rule or regulation.

[4] We note that in National Treasury Employees Union v. U.S. Customs Service, No. 84-5754 (D.C. Cir. Sept. 26, 1986), the D.C. Circuit recently sustained an agency's denial of a union's request under the Freedom of Information Act for disclosure of the agency's crediting plans. In finding that the crediting plans constitute materials "related solely to the internal personnel rules and practices of an agency" which are exempt from disclosure under 5 U.S.C. § 552(b)(2), the D.C. Circuit agreed with the agency's contention that release of the plans could compromise the agency's evaluation process. The court found, slip op. at 7-8, that "advance knowledge of the plans by applicants would allow and induce at least some of them to embellish--or perhaps even fabricate--their backgrounds to suit the appropriate crediting plan."

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, the Union's petition for review is dismissed.

Issued, Washington, D.C., October 29, 1986.

J. Calhoun

Jerry D. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

9/Case/399

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 399 REPORT OF CASE DECISIONS November 6, 1986

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UNFAIR LABOR PRACTICE CASES

23 FLRA No. 92 (October 30, 1986)

National Federation of Federal Employees, Local 1453 and Kenneth A. Crawford, an individual, and National Federation of Federal Employees Local. 1453 and Clara Mae Dixon, an individual, Case Nos. 4-CO-20022 and 4-CO-30012

23 FLRA No. 94 (October 31, 1986)

Office of Personnel Management and American Federation of Government Employees, Local 32, AFL-CIO, Case No. 3-CA-50464

23 FLRA No. 96 (October 31, 1986)

Department of Health and Human Services, Social Security Administration Baltimore, Maryland and American Federation of Government Employees, AFL-CIO, Case No. 4-CA-40007

NEGOTIABILITY CASES

23 FLRA No. 93 (October 30, 1986)

National Treasury Employees Union, Chapter 52 and Internal Revenue Service Austin District, Case No. 0-NG-1163

Y3.F31/21-3:

23 FLRA No. 95 (October 31, 1986)

National Association of Government Employees Service Employees International Union, AFL-CIO, Case No. 0-NG-1300

23 FLRA No. 97 (October 31, 1986)

National Association of Government Employees, Local R7-23 and Department of the Air Force Scott Air Force Base, Illinois, Case No. 0-NG-1252

Federal
Labor Relations
Authority

23 FLRA No. 92

NFFE, Local 1453 and Kenneth A. Crawford, an Individual, Case No. 4-CO-20022; **NFFE, Local 1453 and Clara Mae Dixon, an Individual**, Case No. 4-CO-30012 (Decided October 30, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practices	7114(a)(1)
Duty of Fair Representation	7116(b)(1) and (8)
Analysis of	7118
Executive Order 11491 Case Law Applicable	
Statute's Standard vs. NLRA's Standard	
Grievance Procedure	
Failure to Inform Grievant of Change in Status of Grievance	
Failure to File Grievance Absent Employee Request	
Negligent and Inept Representation	
Standard for Determining a Breach	
Arbitrary/Bad Faith Action Resulting in Disparate Treatment	
Union Violations	
Otherwise Refuse to Comply with the Statute	
7114(a)(1)	

DIGEST NOTES

The standard for determining whether an exclusive representative has breached its duty of fair representation under section 7114(a)(1) is whether the union deliberately and unjustifiably treated one or more bargaining unit employees differently from other employees in the unit. That is, the union's actions must amount to more than mere negligence or ineptitude, the union must have acted arbitrarily or in bad faith, and the action must have resulted in disparate or discriminatory treatment of a bargaining unit employee. The Authority reviewed the development of the duty of fair representation under Executive Order 11491 and the Statute and differentiated it from the similar obligation section 9(a) of the NLRA, under which the concept of the duty of fair representation developed in the private sector. The second sentence of section 7114(a)(1) of the Statute -- which has no counterpart in the NLRA -- imposes certain duties upon a labor organization when it acquires the right of an exclusive representative set forth in the first sentence.

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The union did not violate section 7116(b)(1) and (8) when it failed to inform one employee of a change in the status of his grievance and failed to file a grievance for another employee who was terminated but who did not specifically request the union to file. Although the union may have been negligent or inept in its representation of the employees, mere negligence does not support the finding that the duty of fair representation has been breached under section 7114(a)(1). In order to find a section 7114(a)(1) violation, the union's actions must amount to more than mere negligence or ineptitude, the union must have acted arbitrarily or in bad faith, and the action must have resulted in disparate or discriminatory treatment of a bargaining unit employee.

Federal
Labor Relations
Authority

23 FLRA No. 93

NTEU, Chapter 52 and IRS, Austin District, Case No. 0-NG-1163 (Decided October 30, 1986

SUBJECT MATTER INDEX ENTRIES

- Collective Bargaining Agreement
  - Agreement Provisions that Are
    - Contrary to Law or Regulation
  - Ratification/Approval of Agreement
    - Agency's Head's Review of Local Supplemental Agreements
      - Time Limits Under 7114(c)(2)
      - Time Limits Established Under 7114(c)(4)
- Negotiability
  - Procedure
    - Agency Head's Disapproval of Agreement
      - Local Supplemental Agreements
        - Time Limits

STATUTE

7105(a)(2)(E)
7114(c)(1), (2), (3), (4)
7117

DIGEST NOTES

The time limits for approval by an agency head of a local supplemental agreement is either the time limit established under section 7114(c)(4), or in the absence of such an establishes limit, the 30-day time limit provided by section 7114(c)(2). Section 7114(c) of the Statute establishes a process for approval of negotiated agreements by agencies. Section 7114(c)(1) provides that an agreement between an agency and an exclusive representative "shall be subject to approval by the head of the agency." Section 7114(c)(2) establishes a 30-day time limit for this approval process. However, the agency by agreement with the exclusive representative, by internal agency regulation, or other means can designate officials below the level of the agency head to exercise the approval authority referred to in section 7114(c)(1). In addition, section 7114(c)(3) provides that an agreement automatically becomes effective and binding on the parties on the expiration of the 30-day period prescribed in section 7114(c)(2), if the agency head (or the agency head's designee) has not acted to approve or disapprove the agreement within that period.

Section 7114(c)(4) supplements the provisions of section 7114(c)(1), (2) and (3). Under section 7114(c)(4), the agency and the exclusive representative may negotiate procedures for approving locally negotiated agreements subject to a higher level controlling agreement. In the absence of such a negotiated approval procedure, section 7114(c)(4) also authorizes an agency to establish such procedures under its regulations. Therefore, while Congress has provided in section 7114(c)(2) that 30 days is sufficient time to accomplish review of a collective bargaining agreement, under section 7114(c)(4) the parties to the controlling national agreement or the agency by regulations, may prescribe an approval procedure, including a different time limit, for review of local agreements. A time limit established under section 7114(c)(4) supplants the 30-day time limit contained in section 7114(c)(2) which otherwise would apply. Where, however, neither the controlling agreement nor agency regulations prescribe any time limit for completion of review by the agency head or a designee, the time limit mentioned in section 7114(c)(2) and (3) applies.

The validity of provisions in a supplemental agreement that became effective when the agency head failed to disapprove the provision within the prescribed time limit, may be raised in appropriate proceedings such as grievance or unfair labor practice proceedings. If the agreement provisions are found to be violative of the Statute or any other applicable law, rule or regulation, they would be void and unenforceable.

Federal Labor Relations Authority

23 FLRA No. 94

OPM and AFGE, Local 32, Case No. 3-CA-50464 (Decided October 31, 1986)

SUBJECT MATTER INDEX ENTRIES

- Unfair Labor Practices
  - Agency Violations
    - Refusal to Negotiate
      - Lunch Breaks
- Procedure
  - Forums
    - Interpretation and Application of Contract Provision
- Waiver of Rights
  - Contract Provision Governing Alternate Work Schedules

STATUTE

7116(a)(1) and (5)

DIGEST NOTES

The union waived its rights to bargain over the agency's decision to change lunch schedules to ensure adequate telephone coverage when it agreed to a contract provision governing alternate work schedules. Therefore the agency did not violate section 7116(a)(1) and (5) when it changed an established past practice that allowed unit employees to take their one hour lunch break anytime between 11:30 a.m. through 1:30 p.m. to one that required that the lunch break be at a fixed time, either 11:30 a.m. or 12:30 p.m. Should there be disagreement on contract interpretation, the forum for resolution of such issues is the grievance and arbitration procedures established by the parties in their collective bargaining agreement.

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Federal Labor Relations Authority

23 FLRA No. 95

NAGE, Service Employees International Union and Missouri National Guard, Case No. 0-NG-1300 (Decided October 31, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Procedure
    - Review of Proposals
      - Authority Generally Does Not Consider Parts Separately
  - Subjects of Bargaining, At Election of the Agency
    - Method and Means of Performing Work
      - Uniforms
  - Uniforms
    - Requirement that Employees Wear Uniforms
    - Type of Uniform
      - Where Purpose Is to Identify Personas an Agency Employee
      - Where Purpose Is to Foster Military Discipline

STATUTE

7105(a)(2)(E)
7106(b)(1) and (3)

DIGEST NOTES

A proposal is nonnegotiable which provides that National Guard civilian technicians will be given the option of wearing standardized civilian attire rather than the military uniform. The decision to require civilian technicians to wear a uniform represents management's exercise of its right to determine the method and means of performing work under section 7106(b)(1). However, negotiations over the specific type of uniform to wear may or may not interfere with management's rights depending on the circumstances. In one case where the purpose of requiring employees to wear uniforms was to allow ready identification of employees for security purposes, negotiations over the specific type of uniform did not interfere with management's rights. However, in this case the purpose is very different. Here the purpose of requiring civilian technicians to wear uniforms is to foster military discipline, promote uniformity, encourage esprit de corps, increase the readiness of the military forces for early deployment and enhance identification of the National Guard as a military organization. Given this context, the type of uniform, i.e. a military uniform, is critical to achieving the purpose for which the agency has adopted the uniform requirement.

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Federal Labor Relations Authority

23 FLRA No. 96

HHS, SSA, Baltimore, Md. and
AFGE, Case No. 4-CA-40007
(Decided October 31, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practices	7106
Agency Violations	7116(a)(1) and (5)
Refusal to Negotiate	7117(c)
Declaring a Proposal Nonnegotiable	7118
Conditions of Employment	
Declaration of Nonnegotiability	
No Established Precedent Exists	
Authority Will Not Find a ULP for Refusing to Negotiate	
Memorandum of Understanding	
Obligation to Negotiate Over Specified Proposals Only	

DIGEST NOTES

An agency's declaration of nonnegotiability does not constitute bad faith bargaining where at the time of the declaration, no established precedent exists which is dispositive of the negotiability issue. Since no established precedent existed with respect to a union proposal, the agency did not violate section 7116(a)(1) and (5) for refusing to bargain over it. Moreover, a memorandum of understanding (MOU) signed by the parties that provided for negotiations over the rotation of personnel on a six month basis, did not obligate the agency to negotiate on any and all proposals that the union made. The parties had negotiated for over one month on 13 proposals submitted by the union. Of the original proposals, the union withdrew four because they infringed upon management's section 7106 rights; six were agreed to; and three, including the proposal involved in this case became subjects of unfair labor practice charges.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal
Labor Relations
Authority

23 FLRA No. 97

NAGE, Local R7-23 and Dep't of the Air Force, Scott Air Force Base, Ill., Case No. 0-NG-1252
(Decided October 31, 1986)

SUBJECT MATTER INDEX ENTRIES

- Negotiability
  - Competitive Area
    - Reduction-in-Force
      - Based on Bargaining Unit Membership
- Hours of Work
  - Administrative Workweek [5 C.F.R. section 610.121]
    - Advanced Notice of Change - 7 Days or More
    - Changes Without 7 Days Advance Notice
      - Emergencies
      - Serious Handicap Agency Operations
      - Substantial Increase in Cost
- Management Rights
  - Internal Security Practices
    - Amount of Employee Pecuniary Liability
    - Criteria for Determining Employee Liability
- Mandatory Subjects of Bargaining
  - Appropriate Arrangements
    - Excessive Interference
      - Substitute "Gross Negligence" Standard for "Negligence"
- 5 U.S.C. section 6101(a)(3)(A)
- 5 C.F.R. section 610.121(a) and (b)

STATUTE

7105(a)(2)(E)
7106(a)(1)
7106(a)(2) and (a)(2)(D)
7106(b)(3)
7117(a)(2)

DIGEST NOTES

An agency may not revise employees' tours of duty less than seven days in advance, except where it is determined that: (1) the agency would be seriously handicapped in carrying out its functions; (2) that costs would be substantially increased. In light of American Federation of Government Employees v. Office of Personnel Management, C.A. No. 85-4031 (D.D.C. August 7, 1986), the Authority reconsidered its interpretation of controlling OPM regulations governing previous cases that concerned advance notice to employees of changes in the administrative workweek. Applying this determination to a proposal that would require the agency to give employees and the union 14 days notice before making any changes in established work schedules, except in emergency situations, the Authority found the proposal to be

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

outside the duty to bargain. The exception to the notice period, i.e. "emergency situations", was too narrow. The terms defining the statutory [5 U.S.C. section 6101(a)(3)(A)] and regulatory [5 C.F.R. section 610.121(a)] exceptions were broader than the term "emergency" used in the proposal. [proposal 1]

A proposal is nonnegotiable that would define competitive area for reduction-in-force purposes based on bargaining unit membership. The service area includes both bargaining unit employees and non-bargaining unit employees. Accordingly, by defining competitive areas in terms of bargaining unit membership, the proposal directly determines conditions of employment of nonunit employees. [proposal 2]

A proposal is nonnegotiable that establishes a maximum amount for employee pecuniary liability for damages to government property and sets standards by which employees would be adjudged to be pecuniarily liable. The proposal directly interferes with management's right to determine its internal security practices under section 7106(a)(1). Moreover, even assuming that the proposal constitutes an "arrangement" under 7106(b)(3) for employees adversely affected by management's right to determine its internal security practices, the proposal would be an "inappropriate" arrangement. The proposal, among other things, would replace the standard of simple "negligence," promulgated by management under section 7106(a)(1), with the standard of "gross negligence", which had previously been the standard established by management. That change reflected a determination by management that a new, distinctly different substantive requirement should govern employee conduct on the job. In essence, therefore, the proposal would completely reverse the substantive effect of management's action in changing the standard.

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23 FLRA No. 92

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1453

Respondent

and

Case No. 4-CO-20022

KENNETH A. CRAWFORD, AN INDIVIDUAL

Charging Party

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1453

Respondent

and

Case No. 4-CO-30012

CLARA MAE DIXON, AN INDIVIDUAL

Charging Party

DECISION AND ORDER

I. Statement of the Case

This consolidated unfair labor practice case is before the Authority on exceptions filed by the General Counsel to the attached Decision of the Administrative Law Judge. The Respondent filed an opposition to the General Counsel's exceptions. The consolidated complaint alleged that the Respondent (the Union) breached its "duty of fair representation" as required by section 7114(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute) and thereby violated section 7116(b)(1) and (8) of the Statute.

II. Facts and Judge's Findings

Case No. 4-CO-20022 (Kenneth A. Crawford). Employee Crawford was being assisted by the Union in a grievance about his proposed suspension. Without Crawford's knowledge, the agency (Veterans Administration) had returned an attempted "third step" grievance request to the Union, advising it that the proper procedure to follow was to refile the grievance at step one. The Judge found that the Union failed to inform Crawford of the status of his grievance, but that the evidence did not support a finding that the Respondent "refused" to provide such information. The Judge stated that "there is no refusal because there was no specific request actually communicated to the Union." The Union took no further action on the grievance.

Case No. 4-CO-30012 (Clara Mae Dixon). Employee Dixon was informed that she was to be terminated and asked the Union President to help her. She was referred to the Chief Steward. At their first meeting, the Chief Steward asked Dixon to come back once she received her letter of discharge. When Dixon came back with her letter, the Chief Steward asked Dixon to get her personnel file and come back later. Dixon came back, but the Chief Steward was not in the office. On her last day of work, Dixon went to the Union President's office. Following the President's offer to review "quite a few papers" and "quite a few serious charges" against her, Dixon replied that she had more papers to get from home and would return. She did not return and did not specifically request that the Union file a grievance on her behalf. The Judge did not credit Dixon's claim that the Union stated that there was nothing it would do.

III. Judge's Decision

The Judge noted that while the Authority has addressed the question of an exclusive representative's duty under section 7114(a)(1) of the Statute to represent employees "without regard to labor organization membership," it has not addressed the duty under that section to represent employees "without discrimination."

The Judge analyzed at length the private sector experience under the general provisions of the National Labor Relations Act (the NLRA), as amended. The Supreme Court in Vaca v. Sipes, 386 U.S. 171 at 190 (1967), stated that:

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.

As the Judge pointed out, the Federal Courts and the National Labor Relations Board (NLRB) have differed widely in interpreting what constitutes conduct that is "arbitrary, discriminatory, or in bad faith."

The Judge rejected the proposed standard advanced by the General Counsel that mere negligence or ineptitude is sufficient to establish that a union has been "arbitrary" and thus breached its duty. He also rejected as imprecise the NLRB's standard that "something more than negligence" must be shown to establish a breach of duty. The Judge concluded that in order to show that a union has breached its duty of fair representation under the Statute, the General Counsel must prove that the union has "deliberately and unjustifiably refused or failed to represent a bargaining unit employee." The Judge applied this standard to the facts of each case.

Crawford. As to employee Crawford, the Judge found that while the Union may be faulted as ineffective or inept in its actions regarding Crawford's grievance, the General Counsel failed to prove that the Union deliberately and unjustifiably failed or refused to represent him. The Judge thus found no breach by the Union of its duty of fair representation and no violation of the Statute.

Dixon. As to employee Dixon, the Judge found that Dixon had not fully cooperated with the Union in an effort to grieve her case and that she did not in fact request the Union to file a grievance on her behalf. He found that the Union had not failed or refused to represent Dixon and thus did not breach its duty or violate the Statute.

IV. Positions of the Parties

The General Counsel excepts to the standard used by the Judge to determine the extent of the Union's duty of fair representation under the Statute and to the Judge's application of this standard to the facts. The General Counsel maintains that negligence alone is sufficient grounds for finding a violation.

The Respondent Union generally supports the standard applied by the Judge. It points also to the fact that, while the Union took no action to refile Crawford's grievance, Crawford knew in sufficient time before his suspension that the grievance had to be refiled, but did not do so.

V. Analysis

We are in substantial agreement with the Judge's rationale and with his ultimate conclusions.[1] For the reasons that follow, we find that the Union did not violate the Statute in the circumstances of either of these consolidated cases. While the Authority has addressed an exclusive representative's alleged breach of its duty of fair representation based on union membership considerations,[2] we have not yet fully addressed the nature of an exclusive representative's duty of fair representation where union membership is not a factor.[3] We must first determine what standard to apply in deciding whether the duty has been met.

The duty of an exclusive representative to fairly represent all unit employees arises under the second sentence of section 7114(a)(1) of the Statute. See Appendix. While the first sentence of section 7114(a)(1) is comparable to section 9(a) of the NLRA, under which the concept of the duty of fair representation developed in the private sector, that sentence sets forth certain rights of representatives which must be accorded to a labor organization which has achieved the status of exclusive representative for an appropriate bargaining unit. The second sentence of section 7114(a)(1) -- which has no counterpart in the NLRA -- imposes certain duties upon a labor organization when it acquires the right of an exclusive representative set forth in the first sentence.[4]

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[1] We find it unnecessary to, and do not, adopt the Judge's comments as to the comparative economic strength of Federal unions or the ability of their representatives.

[2] See, for example, National Treasury Employees Union and National Treasury Employees Union Chapter 204, 18 FLRA No. 36 (1985); National Treasury Employees Union and National Treasury Employees Union Chapter 121, 16 FLRA 717 (1984), reversed sub nom. National Treasury Employees Union v. FLRA, No. 85-1053 (D.C. Cir. Sept. 2, 1986), petition for rehearing filed (October 17, 1986); and National Treasury Employees Union, 10 FLRA 519 (1982), aff'd sub nom. National Treasury Employees Union v. FLRA, 721 F.2d 1402 (D.C. Cir. 1983).

[3] In a recent decision, American Federation of State, County, and Municipal Employees, Local 2477, AFL-CIO, 22 FLRA No. 85 (1986), petition for review filed sub nom. American Federation of State, County and Municipal Employees v. FLRA, No. 86-1450 (D.C. Cir. Aug. 12, 1986), the Authority adopted its Judge's finding that the union failed to comply with its duty of fair representation. However, that case involved a union's admitted refusal to provide legal representation to an employee who had engaged in statutorily protected activity.

The second sentence of section 7114(a)(1) is virtually identical to the second sentence of Section 10(e) of Executive Order 11491, as amended (see Appendix), which was interpreted as "imposing certain obligations upon a labor organization when it acquires the rights of an exclusive representative." See, for example, United States Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, 3 FLRC 686, 690 (1975). Since the provisions of the Statute and the Executive Order are virtually identical, and when Congress enacted the Statute it adopted the language of the Executive Order without comment, the Executive Order case law is relevant. In American Federation of Government Employees, Local 2126, AFL-CIO, San Francisco, California, 1 FLRA 993 (1979), the Authority held that the exclusive representative, by refusing a request to act as an advisor, "did not act arbitrarily or perfunctorily or in bad faith," and thus did not breach its duty of fair representation." In American Federation of Government Employees, AFL-CIO, Local 987, 3 FLRA 715 (1980), it was held that "mere negligence will not support a finding that the duty [of fair representation] has been breached." In Local R7-51, National Association of Government Employees (NAGE), A/SLMR No. 896, 7 A/SLMR 775 (1977), the Assistant Secretary held that the "duty of fair representation is breached only when the exclusive representative's conduct is arbitrary, discriminatory, or in bad faith."

Under the Executive Order, therefore, a union's duty of fair representation included not only the prohibition on discrimination expressly set forth in section 10(e), but also the obligation to represent employees without arbitrariness or bad faith implicit in that section. In our view, Congress intended the Authority to apply a similar standard under the analogous provision in section 7114(a)(1) of the Statute. The Eleventh Circuit's decision in Warren v. Local 1759, American Federation of Government Employees, 764 F.2d 1395, 1396, 1399 n.5 (11th Cir.), cert. denied, 106 S.Ct. 527 (1985), supports our conclusion that the second sentence of section 7114(a)(1) is the source of the duty of fair representation in the Federal sector. But see Pham v. Local 916,

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[4] National Treasury Employees Union, 16 FLRA 717 at 733; National Treasury Employees Union, 10 FLRA 519 at 533-4.

American Federation of Government Employees, 799 F.2d 634, 638-39 (10th Cir. 1986), petition for rehearing filed (October 8, 1986).

Based upon the clear language of the Statute and the applicable legislative history,[5/] we find that where union membership is not a factor, the standard for determining whether an exclusive representative has breached its duty of fair representation under section 7114(a)(1) is whether the union deliberately and unjustifiably treated one or more bargaining unit employees differently from other employees in the unit. That is, the union's actions must amount to more than mere negligence or ineptitude, the union must have acted arbitrarily or in bad faith, and the action must have resulted in disparate or discriminatory treatment of a bargaining unit employee. As discussed above, this standard is consistent with that used in Executive Order cases and with that used by the National Labor Relations Board in deciding similar cases. See Office and Professional Employees International Union, Local No. 2, AFL-CIO, 268 NLRB 1353 (1984).

VI. Conclusion

As to Kenneth A. Crawford, the Authority finds that the General Counsel has not established that the Union deliberately and unjustifiably treated him differently from other bargaining unit employees. There is no showing that the Union's actions in failing to notify Crawford of the return of his grievance or to take any action to renew it at a different step constituted other than mere negligence or miscommunication.

As to Clara Mae Dixon, the Authority also finds that the General Counsel has not established that the Union deliberately and unjustifiably treated her differently from

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[5/] See National Treasury Employees Union v. FLRA, where the D.C. Circuit stated (721 F.2d at 1406):

> Section 7114(a)(1) . . . means exactly what it says. Furthermore, there is absolutely nothing in the legislative history or in any case law construing the Statute to support the Union position [interpreting section 7114(a)(1) to codify the duty of fair representation as it has developed in the private sector, and by interpreting 'fair representation' to be synonymous with 'adequate representation.'].

other bargaining unit employees. In this regard, there is no showing that the Union did anything other than express views on the nature of the evidence against Dixon.

Accordingly, the Authority finds that the Union did not violate section 7114(a)(1) of the Statute, and did not violate section 7116(b)(1) and (8) of the Statute. Therefore, we shall dismiss the consolidated complaint.

ORDER

IT IS ORDERED that the consolidated complaint in Case Nos. 4-CO-20022 and 4-CO-30012 be, and it hereby is, dismissed in its entirety.

Issued, Washington, D.C., October 30, 1986.

L Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

Section 7114(a)(1) provides:

> § 7114. Representation rights and duties
>
> (a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

Section 10(e) of Executive Order 11491, as amended, provided in pertinent part:

> Sec. 10. Exclusive recognition.
>
> . . . . . .
>
> (e) When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and negotiate agreements covering all employees in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership. . . .

(23 FLRA No. 92)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1453
Respondent

and

KENNETH A. CRAWFORD, AN INDIVIDUAL
Charging Party

Case No. 4-CO-20022

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1453
Respondent

and

CLARA MAE DIXON, AN INDIVIDUAL
Charging Party

Case No. 4-CO-30012

Patrick J. Riley, Esq.
For the Respondent

Roy W. McIntosh
For the Charging Party

Barbara S. Liggett
For the General Counsel

Before: FRANCIS E. DOWD
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, herein referred to as the Statute, 92 Stat. 1191, 5 U.S.C. § 7101 et seq. It was instituted by the Regional Director of the Fourth Region of the Federal Labor Relations Authority.

The charge in Case No. 4-CO-20022 was filed on August 5, 1982, by Kenneth A. Crawford, an individual (hereinafter referred to as Crawford), against the National Federation of Federal Employees, Local 1453 (hereinafter referred to as the Union or Respondent. The charge in Case No. 4-CO-30012 was filed on February 14, 1983, by Clara Mae Dixon, an individual (hereinafter referred to as Dixon), against the Union. On May 18, 1983, an Order Consolidating Cases, Amended Consolidated Complaint and Amended Notice of Hearing issued, which was further amended at the hearing in this matter. The complaint alleges that Respondent violated section 7116(b)(1) and (8) of the Statute, when it failed and refused to represent Crawford and Dixon, and thereby failed and refused to comply with the provisions of section 7114(a)(1) of the Statute. Essentially, the issue is whether or not the Union breached its "duty of fair representation" to Crawford or Dixon, or both.

A hearing was held in Miami, Florida at which time the parties were represented by counsel and afforded full opportunity to adduce evidence and call, examine, and cross-examine witnesses and argue orally. Briefs filed by the Respondent and General Counsel have been duly considered.

Upon the consideration of the entire record[1] in this case, including my evaluation of the testimony and evidence presented at the hearing, and from my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommended order.

Findings of Fact

1. The Veterans Administration, herein called VA, is an agency within the meaning of Section 7103(a)(3) of the Statute. The VA Medical Center, Miami, Florida, herein called VAMC, is an administrative subdivision within the VA and an activity within the meaning of Section 2421.4 of the Rules and Regulations of the Authority.

2. National Federation of Federal Employees and Local 1453 are labor organizations within the meaning of Section 7103(a)(4) of the Statute. Prior to October 1, 1981, NFFE, Local 1453 was the exclusive representative of certain VAMC employees. On October 1, 1981 certain

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[1] The General Counsel filed a Motion to Correct Transcript containing 103 proposed corrections. The Respondent filed opposition to 45 of the proposed corrections. To the extent that the General Counsel's motion has been granted fully or partially, the transcript has been corrected accordingly. To the extent that the motion has been denied, the transcript remains unchanged. Counsel have been notified in writing of my rulings with respect to each of the proposed corrections.

units at the VA were consolidated in Case No. 3-UC-11. Local 1453 became part of a consolidation of NFFE locals known as the Council of Veterans Administration Locals.

3. At all times material herein, the following persons were agents of Respondent: Elnora B. Weaver (President), Mary Vanaman (Fourth Vice President and Secretary), Jeanette Cottle (Chief Steward), Benny Dykes and Preston Jackson (Area Stewards).

Case No. 4-CO-20022 (Kenneth A. Crawford)

4. Kenneth Crawford was employed at the VAMC as GS-16 Purchasing Agent from December 1979 through July 1982. He is now employed by the U.S. Postal Service. His immediate supervisor at the VAMC was Frank Tiano, Chief of Purchasing and Contracts. Tiano reported to Walter Whittaker, Assistant Chief of Supply and to Wayne Hart, Chief of Supply. Hart reported to T.C. Doherty, the VAMC Director.

5. According to Crawford, Tiano had promised him a day off on Friday, March 5, 1982. This was cancelled and at Crawford's request Union Chief Steward Cottle met with Tiano and Crawford on about March 3 about the matter, together with Maggie Smith, Tiano's assistant. The result was that management took the position it had a right to cancel days off for the good of the service when it was necessary to do so. The next day, Crawford became ill and reported to the VA hospital "in the evening" where he was able to obtain a "two week duty excuse" covering the period from March 5 through March 18 or 19. Crawford described his illness as a "service-connected injury" which flares up from time to time. He was not any more specific. Crawford, whom I found to be intelligent, competent and agressive, chose not to directly inform his supervisor about the reasons for his failure to report to work. If credited, Crawford merely told the doctor to inform the administrative duty officer who would, in turn inform the service of his absence (Tr. 48). When he eventually (at 11:30 the evening of March 4) called his supervisor he was told he was being placed on AWOL. Apparently his shift began at 8:00 p.m. and carried over to Friday, March 5. It is not clear whether this is the shift he originally had been given off, or whether it is a shift actually beginning the evening of March 5.

In any event, one thing lead to another and Crawford's next dispute with the VA concerned his insistence on using sick leave and LWOP during his absence and VA's refusal to grant him LWOP in lieu of annual leave. Union steward Cottle assisted Crawford at some of his meetings with supervisory officials.

6. A different account of what happened may be gleaned from G.C. Exh. No. 5, a proposed suspension (for 15 days) dated March 29. This document accuses Crawford of the following:

a. On March 3, 1982 you contacted Mrs. Maggie Smith, stating that you needed four hours of annual leave and that you would come to work by 12:30 PM or call. You did not report for work or call and were charged 4 hours of Absence Without Leave (AWOL).

b. You did not follow proper procedures in requesting sick leave on March 5, 1982 in that you did not request sick leave until 1:00 PM and Medical Center Policy 05-36-77 dated August 10, 1977 requires you to call in within two hours of the beginning of your tour of duty. You were therefore charged 5 hours of Absence Without Leave (AWOL).

c. You did not follow proper procedures in requesting leave for March 5, 1982 through March 12, 1982 in that you have failed to submit an SF-71 covering this period of time as requested by Mr. Tiano, your immediate supervisor, and as required by Medical Center Policy 05-36-77 dated August 10, 1977.

d. You were charged Absence Without Leave for the period of March 5, 1982 through March 12, 1982 for failing to properly request leave.

On the second page of the proposed suspension notice, Crawford indicated that he desired the Union to be given a copy of the letter. On the same day, March 29, he sent a second memo to the Union requesting its assistance but failed to indicate the reason for his request. (Having previously obtained the assistance of Cottle by merely telephoning her, it appears to me that Crawford was attempting to "document" his attempt to obtain Union assistance by these memos.) In any event, he talked to Chief Steward Cottle and Mary Vanaman (a paid secretary of the Union) on April 6 and Vanaman typed a request for an extension of time in which he responded to the proposed suspension. Hart replied on April 26 granting an extension of time until close of business on April 30. Crawford's rebuttal dated April 30 was prepared by himself and typed by Vanaman. I credit Cottle's testimony that she did not review it.

7. By memo dated May 6, Hart informed Crawford that he was being suspended for 7 days, May 12 through to May 18. He was also told he had a right to file a grievance which "must be submitted through your supervisor not later than fifteen (15) calendar days after you receive this suspension." (Under the current agreement, then in effect, an employee had 30 days.) I credit Crawford's testimony, and discredit Cottle, that she suggested to Crawford that he file his grievance at the

Step Three level with the Director. (See last paragraph of G.C. Exh. No. 9.) By memo dated May 20, Crawford prepared and signed a grievance which was submitted with a cover letter from the Union to Director T.C. Doherty. By memo dated May 26, Doherty returned the grievance to the Union but did not notify Crawford of this fact. The memo advised the Union that the proper procedure was to file the grievance at Step One with the Chief of Supply Service.

8. Crawford testified that in June and July he attempted to contact Cottle, and she acknowledges these attempts. Except for Crawford's own testimony, the evidence does not establish that his purpose was to inquire about the status of his grievance. He never really stated in any phone calls that this is all he was seeking; he didn't leave any message at the Union office; and he didn't memoralize in writing his intended purpose. He could have been seeking help in connection with more serious problems he was having at the same time, as noted in the next paragraph. Nevertheless, it was logical and quite natural for him to be inquiring about his grievance, so I accept his testimony that this was his purpose. More importantly, during this period no Union official attempted to contact Crawford and tell him about Doherty's refusal to accept the grievance at Step Three.

9. By memo dated June 24, Crawford was notified by Hart that VAMC proposed to remove him based on a number of incidents, including insubordination and AWOL, occurring between May 7 and June 1 (G.C. Exh. No. 10). The testimony does not indicate that Crawford sought the Union's assistance with these incidents until after his removal was proposed. On about July 5 or 6 he found Cottle in the Union office. She said Vanaman was on vacation so she couldn't provide clerical help. She suggested he submit a handwritten response to Doherty, which he did on July 7. On July 22 Doherty issued a decision to remove Crawford (G.C. Exh. No. 12). Although his decision made reference to the prior suspension, I believe the General Counsel is mistaken when suggesting inferentially that but for the prior suspension perhaps the penalty here would be something less than removal. To suggest this conclusion is to ignore the allegations of insubordination contained in the proposed removal letter.

10. On an unspecified date, Vanaman told Crawford that Weaver had received a reply from Doherty. On July 26, 1982, Crawford went to the Union office and confronted Weaver about the letter from Doherty that Vanaman had mentioned to him. Crawford asked if she was aware of the letter and if she had a copy of it. Weaver looked through several files and found the letter dated May 26, 1982. Crawford read the letter and asked why someone had not informed him so that they could go back to Steps One and Two. Weaver replied that the Union had followed the correct procedure, and that if Crawford believed what Doherty was saying in the letter, then he should not be in the Union office he should be downstairs with management. Weaver threw the file folder designated

"Kenneth Crawford" to Crawford and told him to get out, that there was nothing the Union could do. I am unable to credit Weaver's testimony that she never discussed Doherty's letter with Crawford.

11. The Complaint alleges in paragraph 9 that on several occasions in June and July after the grievance was filed, (1) Crawford attempted unsuccessfully to contact the Union for the purpose of inquiring about the status of his grievance, and (2) that the Union officials failed and refused to provide him with such information, and (3) took no further action with respect to the grievance. As to (1) I credit Crawford's testimony and conclude that this allegation is supported by the evidence. As to (2) I find that the Union failed to inform Crawford of the status of his grievance; however, the evidence does not support a finding that Respondent refused to provide such information. There is no refusal because there was no specific request actually communicated to the Union. As to (3), there is no dispute that the Union took no further action on the grievance. No attempt was made to refile at Step One or to ask Doherty to reconsider his Step Three decision.

12. Factually, Respondent's defense is simply to explain what happened from its viewpoint and to attempt to rebut some of Crawford's assertions. To this end, Counsel for Respondent produced two witnesses: Union President Weaver and Chief Steward Cottle. (Mary Vanaman was out of the state and unavailable to testify.) Except where their testimony was in direct conflict with Crawford's, I found them both to be basically honest and forthright. Although I have accepted Crawford's testimony that he was attempting to contact Cottle, I do not find that she was intentionally avoiding any contact with him. A careful review of the entire record, including the exhibits, shows that whenever Crawford really wanted to get a hold of a Union official he was able to do so. The fact remains, however, that the Union officials failed to communicate with him. I am unable to accept Weaver's explanation that she didn't tell Crawford because she didn't see him. What is more likely, as her counsel suggests, is that she never even thought to contact Crawford. Weaver also testified that she didn't go back to the Director because she thought that would have been futile. What is more likely is either that she too readily accepted management decisions in order to avoid confrontations, or she really thought it was correct to file at Step Three. But, she did not request arbitration and offered no explanation as to why she didn't refile the grievance at Step One. Finally, as to Weaver's testimony that she made "an honest mistake," I do not accept her own characterization of the Union's inaction. Her repetition of this phrase seemed more contrived - for the purpose of this hearing - than genuine. (When she threw Crawford's file at him and told him to get out, she certainly was not admitting any mistake.) With respect to Cottle, her testimony was more confused than evasive and in many respects more believable than Weaver or Crawford. I accept her explanation that she assumed Crawford received a copy of Doherty's reply because he signed his grievance and because he did all his own writing and kept copies of all the pertinent documents. I believe this describes Crawford accurately.

I do not believe she was aware of Doherty's reply until preparing for this hearing. I do not agree with the General Counsel that her testimony (Tr. 194-198) was contradictory. Even Crawford appeared to believe that Cottle was unaware of the Doherty response (Tr. 68, lines 10-12).

Case No. 4-CO-30012

13. On December 8, 1982, Dixon, an employee at the VAMC since February 8, 1982, was informed by Assistant Chief of Nursing Elizabeth Hamlet, that her performance as a nursing assistant was unsatisfactory and that she would be terminated on January 25, 1983. The following day, Dixon went to see Weaver who was on duty at the time. Dixon told Weaver she was going to be discharged, and asked Weaver if she could help her. Weaver told her this was Chief Steward Cottle's job and told her to see Cottle (Tr. 102, lines 19-20). Dixon went to Cottle and explained her situation. Cottle told Dixon to come back when she had received the letter of discharge.

14. On January 14, 1983, Dixon received a notice of discharge (G.C. Exh. No. 14). After receiving the notice Dixon met Cottle on or about January 21 enroute to the bathroom and followed her into the bathroom where she showed Cottle the discharge notice. I credit Cottle that she told Dixon to get her file from personnel and meet Cottle later in the Union office (Tr. 102, lines 15-16). Cottle went to the Union office and waited but Dixon did not appear. I do not credit Dixon's version that Cottle reviewed her "papers" and said there's nothing she could do.[2]

15. On January 25, her last day of work, Dixon came to Weaver's office accompanied by Queenie Johnson. Dixon had quite a few papers with her which Weaver examined and then commented that "you have quite a few serious charges here against you." According to Weaver, Dixon replied, "Well, they are all lies." Weaver then offered to get together and see what could be done to get the matter resolved, but Dixon said she had more materials at home which she would obtain and then return in a few days. She did not return. Again, I do not credit Dixon's version that Weaver merely responded (allegedly like Cottle) that there was nothing she could do.[3]

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[2] If Cottle had said she could not do anything, I believe it is more likely she would have given a reason; e.g., because you have a nonmeritorious case or because you are a probationary employee.

[3] After Dixon filed an unfair labor practice charge on February 14, 1983, Counsel for Respondent instructed the Union to file a grievance any way and to request the VAMC to waive its untimeliness. The VAMC denied the grievance as untimely on the ground that the current Agreement did not apply to probationary employees (See G.C. Exh. Nos. 16 and 17).

16. I also find, based upon my review of Dixon's testimony, that while she sought the assistance of the Union, she did not specifically request the Union officials to file a grievance as alleged in the Complaint.

17. From June 16, 1978 until June 4, 1982, a collective bargaining agreement (G.C. Exh. No. 21) between the Union and the VAMC (herein called the Local Agreement) governed the rights and obligations of the parties. An Interim Agreement (G.C. Exh. No. 22) defined the rights of the parties between June 4, 1982 and January 12, 1983, the effective date of the current collective bargaining agreement (G.C. Exh. No. 20) between NFFE and the Veterans Administration (herein called the Master Agreement). Each of these agreements contains a negotiated grievance procedure which was effective during the periods set forth above. The grievance procedures in the Local Agreement and the Interim Agreement specifically provided that the grievance procedures did not apply to the termination or separation of probationary employees. (G.C. Exh. No. 21, Article XII, Section 1; G.C. Exh. No. 22, Grievance Procedure, Paragraph 2(f)). However, the current Master Agreement is silent as to probationary employees. Because they are not specifically excluded, the Union argues that they are included. The VA, however, apparently argues that probationary employees are excluded in Article 6, Section 2 because they come within the category of statutory exclusions encompassed by Section 7121(c)(4) of the Statute which states that any negotiated grievance procedure shall not apply to grievances concerning "any examination, certification, or appointment."

Discussion of the Applicable Case Law

Insofar as I have been able to determine, this is a case of first impression concerning a union's duty of fair representation under the Federal Service Labor-Management Relations Statute. In my opinion, this straightforward facts presented here present the Authority with an opportunity to chart a course and enunicate the appropriate standard to be followed in future cases in which the exclusive representative is charged with negligence or ineptitude. For this reason, I have elected to present a detailed analysis of the history surrounding the duty of fair representation. To this end I have been assisted by an excellent brief submitted by Respondent's counsel, whose main thesis and detailed research have been incorporated herein to the maximum extent possible, as modified and expanded to reflect my own views.

A. Evolution of the Duty of Fair Representation.

In 1944, the Supreme Court held in a racial discrimination case arising under the Railway Act (45 U.S.C. § 151 et seq.) that a bargaining representative had a "duty to exercise fairly the power conferred upon it on behalf of all those for whom it acts, without hostile discrimination against them." Steele v. Louisville & Nashville RR Co., et. al., 323 U.S. 192 (1944); see also Tunstall v. Brotherhood of Locomotive Fireman, 323 U.S. 210 (1944). And, in The Wallace Corporation v. NLRB, 323 U.S. 248, 255, the Supreme Court observed that a union, by its selection as bargaining representative, became "the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially." Subsequently, the Supreme Court extended this duty to unions certified under the National Labor Relations Act, as amended, (herein the NLRA) 29 U.S.C. § 141 et seq. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

The National Labor Relations Board, hereinafter referred to as the NLRB, decided in 1962 that Section 7 of the NLRA gives employees the "right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment." Miranda Fuel Company, Inc., 140 NLRB 181, 185. Thus, the NLRB concluded that a breach of the duty of fair representation constituted an unfair labor practice. The Miranda decision, however, was denied enforcement by a divided Second Circuit, 326 F.2d 172 (1963).

In Humphey v. Moore, 375 U.S. 325, 349 (1966), Moore, on behalf of other aggrieved employees, sought to enjoin the implementation of a decision by the Union and the Company to dovetail seniority lists. The Supreme Court held that it was proper to institute such suit in a State Court under Section 301 of the NLRA, but that federal law governed. In a passing reference to the NLRB's Miranda decision, the Court stated:

> Although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act, it is not necessary for use to resolve that difference here. Even if it is, or arguably may be, an unfair labor practice, the complaint here alleged that Moore's discharge would violate the contract and was therefore within the cognizance of federal and state courts, . . . subject, of course, to the applicable federal law. (Footnotes omitted).

In discussing a union's duty of fair representation the Supreme Court quoted from its earlier decision in Ford v. Huffman, as follows:

> A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. Id., at 338. Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes.

As to the merits, the Supreme Court held that (1) "the union acted upon wholly relevant consideration, not upon capricious and arbitrary factors," and (2) "the union took its position honestly, in good faith and without hostility or arbitrary discrimination." Accordingly, the Supreme Court found no breach of the duty of fair representation.

In 1967 the Supreme Court had an opportunity to further elaborate on the duty of fair representation in its landmark decision of Vaca v. Sipes, 386 U.S. 171 (1967). A principal issue resolved by the Court was that the NLRB's Miranda decision did not preempt the State Court from jurisdiction over suits by individuals under Section 301, and that the NLRB's "tardy assumption of jurisdiction" over the duty of fair representation cases by virtue of its Miranda decision did not "oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative." Id. at 183. In discussing the standard against which to determine whether a union has violated its duty of fair representation, the Court at (190) stated that:

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. See Humphrey v. Moore, supra; Ford Motor Co. v. Huffman, supra.

Four years later in Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971), the Court reaffirmed the Vaca standard. In order for an employee to make out a claim of breach by his union "[h]e must have proved 'arbitrary or bad-faith conduct' on the part of the Union." Id. at 299, citing Vaca, supra, 386 U.S. at 193. While discussing preemption principles in Lockridge, the Court explained that "the duty of fair representation was judicially evolved . . . to enforce fully the important principle that no individual union member may suffer invidious, hostile treatment at the hands of the majority of his coworkers," and that "the very distinction . . . between honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment, on the other hand, needs strictly to be maintained." Id. at 301. [Emphasis mine.]

B. Conflict Among the Federal Courts in the Application of the Vaca standard.

As noted above, the Vaca standard is "arbitrary, discriminatory, or in bad faith." In this regard the Courts have had very little problem with determining when a union's conduct is discriminatory or in bad faith. There is no question that the duty has been violated when the evidence demonstrates that the union did not pursue a grievance due to personal animosity, internal political rivalry, invidious discrimination or some other form of intentional misconduct. The problem arises in determining when such conduct is "arbitrary."[4] Unfortunately, there have been some conflicting opinions issued by lower federal courts concerning the type of conduct which comes within the meaning of "arbitrary." The reason for the conflict seems to stem from the fact that the Supreme Court in Vaca also used the word "perfunctory" elsewhere in its decision.[5] As a result, some courts consider perfunctory to be synonymous with arbitrary or at least included within the definition of arbitrary. Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975) (Ruzicka I), clarified 649 F.2d 1207 (1981) (Ruzicka II); Robesky v. Quantas Empire Airways, Ltd., 573 F.2d 1082, 1089-91 (9th Cir. 1978). While the courts agree that simple negligence is insufficient to give rise to a breach of duty claim, the courts differ with each separate set of facts on the amount or degree of negligence, if any, required to come within the meaning of "arbitrary" or "perfunctory." Compare Dutrisac v. Caterpillar Tractor Co., 511 F. Supp. 719 (N.D. Cal. 1981) with Hoffman v. Lonza Inc., 658 F.2d 519 (1981).

The 1981 Dutrisac decision essentially follows the Ruzicka principle that a showing of bad faith is not an essential element in any claim of unfair representation. In Dutrisac, the union steward processed a grievance to the third step but then failed to timely file a request for arbitration for a discharged employee. The court concluded that in a case of a terminated employee, where a determination had been made by the union that the grievance had some merit, "no matter how innocently the time limit was missed, such conduct cannot constitute 'mere' negligence." Id. at 727. Since missing the deadline deprived the employee of his exclusive forum to challenge his discharge, the steward's failure to act was arbitrary conduct constituting a breach of the duty of fair representation.6/ On the other hand, a different result was obtained in Hoffman a case involving essentially the same facts. There, the Seventh Circuit concluded that applicable law required proof of intentional misconduct on the part of the union. Since the union simply "forgot" to perfect the grievant's appeal to arbitration, a breach of duty had not been shown. Citing Lockridge, at 299, the Court concluded that the duty of fair representation was not breached "without substantial evidence of fraud, deceitful action or dishonest conduct."7/ Accord, Graf v. Eglin, Joliet and Eastern Railway Co., 697 F.2d 771 (7th Cir. 1983); Superczynski v. P.T.O. Services, Inc., 706 F.2d 200 (7th Cir. 1983); Medlin v. Boeing Vertol Co., 620 F.2d 957, 961 (3rd Cir. 1980). See also, Cannon v. Consoliated Freightways Corp., 524 F.2d 290 (7th Cir. 1975).

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[4] Webster's Third New International Dictionary (1971) defines "arbitrary" as "depending upon choice or discretion . . . arising from unrestrained exercise of the will, caprice, or personal preference, . . . based upon random or convenient selection or choice rather than on reason on nature . . . (as) given to willful irrational choices and demands." Black's Law Dictionary (1979) defines "arbitrary" as "done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending upon the will alone, . . ." In my opinion, a common thread running through the foregoing definitions is that an arbitrary act is a willful act and, therefore an intentional act. I see nothing in these definitions to equate arbitiariness with negligence.

[5] See the following language in Vaca (at p. 194): "In a case such as this, when [the grievant] supplied the Union with medical evidence supporting his position, the Union might well have breached its duty had it ignored [his] complaint or had it processed the grievance in a perfunctory manner." Earlier (at p. 191) the Court used the word "arbitrarily" as a modifier when it stated as follows: "Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement." The same language was later repeated in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 568-69 (1976) (which did not cite Lockridge), and in Electrical Workers v. Foust, 442 U.S. 42, 47 (1979).

Thus, we have the broad standard of the Ruzicka and Dutrisac line of cases, and we have a more narrow standard as exemplified by the Lockridge and Hoffman line of cases. More recently, we have another lower federal court decision which, in my opinion, is worthy of consideration and discussion.

In Lewis v. American Postal Workers Union, 561 F. Supp. 1141 (W.D. Va. 1983), a steward processed a grievance at the early steps of a grievance procedure but failed to file timely at Step Three. The grievance was denied as untimely, and the union elected not to go to

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6/ Counsel for General Counsel relies on the Ruzicka and Dutrisac line of cases in arguing that gross negligence constitutes the type of "arbitrary" conduct needed to establish a breach of the duty of fair representation. In her brief, counsel observed that the Dutrisac court acknowledged that fair representation suits would weaken the financial stability of unions, which might, in turn, impair their ability to function effectively. Thus, the court stated: "For this reason, we limit our holding that union negligence may breach the duty of fair representation of cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim."

7/ Counsel for Respondent relies on the Lockridge and Hoffman line of cases in arguing for an "intentional misconduct" standard.

arbitration and so advised Lewis. Chief Judge James C. Turk reviewed a number of court opinions on the duty of fair representation, including those applicable in the Fourth Circuit.8/ He also pointed to the lack of uniformity among the courts by citing certain other cases.9/ He then concluded as follows:

> The court concludes, after having reviewed the foregoing authorities, that some degree of conscious misfeasance or dereliction is contemplated by the "arbitrary" standard as set forth in Vaca. Thus, the courts' reluctance to find liability for purely negligent acts results from the attempt to implement this distinction. The other two elements of Vaca -- bad faith and discrimination--clearly contemplate distasteful action of the type noted before unions may be held liable. "Arbitrary" or "perfunctory" treatment of grievances may also be condemned on such grounds, when it rests on indifference or slovenliness--in short, when the union has completely abdicated its responsibilities to union members. Thus, when a shop steward misses a deadline because he

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8/ Griffin v. International Union, U.A.W., 469 F.2d 181, (4th Cir. 1972); Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888 (4th Cir. 1980); Del Costello v. International Brotherhood of Teamsters, 510 F. Supp. 716 (D. Md. 1981).

9/ Ethier v. United States Postal Service, 590 F.2d 733 (8th Cir.) (union not liable when steward filed grievance one day too late due to misunderstanding of time requirement), cert denied, 444 U.S. 826 (1979); Foust v. International Brotherhood of Electrical Workers, 572 F.2d 710, 714-16 (10th Cir. 1978) (evidence would support jury finding that untimely filing of grievance was "arbitrary, unreasonable and a breach of duty." 572 F.2d at 716), reversed on other ground, 442 U.S. 42 (1979); Coe v. United Rubber, Cork, Linoleum and Plastic Workers of America, 571 F.2d 1349, 1350-51 (5th Cir. 1978) (careless or inadvertent misnumbering of employee's grievance by union, affording employer defense of untimeliness, held not "arbitrary"); Schum v. South Buffalo Railway Co., 496 F.2d 328 (2d Cir. 1974) (union breached duty of fair representation when, through "lack of diligence," it allowed time period for filing appeal to second step of grievance procedure to lapse); Baker v. Unit Parks Co. 487 F. Supp. 1313, 1315 (W.D. Okla. 1980) (union breached duty by its "total failure to act" after being apprised by employee of existence of grievance); Ruggirello v. Ford Motor Co., 411 F. Supp. 758, 760-71 (E.D. Mich. 1976) (union breached duty when it never instituted formal grievance on employee's behalf, relying instead on informal adjustment methods, and grievance was ultimately rejected as being untimely).

> just does not care, his union may be liable for breaching the duty of fair representation. Negligent handling of a grievance, however, when it results not from a total lack of interest therein, but from an honest mistake or carelessness, is not actionable. Like the negligent tortfeasor in any other area of negligence law, the negligent shop steward has not committed a wrong of the sort contemplated by Vaca.
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> Applying these principles to this case, the court concludes that (Steward) Morrison's failure to file the grievance resulted not from indifference or slovenliness, but from honest mistake or carelessness. Plaintiff, when deposed, testified as to no facts which would suggest otherwise. In fact, as the court already has noted, plaintiff testified at his deposition that he and Morrison were on good terms, and that the latter missed the deadline only because, at worst, he was unfamiliar with the grievance procedure. Further, the court has already held that no evidence supports plaintiff's contention that the grievance was handled against a general backdrop of perfunctoriness.

It appears to me that what the Lewis court is saying is that the broad standard of Ruzicka and Dutrisca is incorrect because negligent acts are not intentional acts of misconduct. At the same time, Lewis gives new meaning to the "arbitrary and perfunctory" language of Vaca by recognizing that there may circumstances where intentional misconduct ought to be imputed to the union where it is shown that the union, by its conduct and behavior, has completely abdicated its responsibilities to its members. By settling on the phrase "some degree of conscious misfeasance or dereliction," the Lewis court essentially is adopting the Lockridge and Hoffman line of cases requiring evidence of intentional misconduct. In the process of reaching this result, however, the court has done the same thing as many other courts have done; it has used new terminology and, in effect, new word-tests.

In light of the foregoing, it seems clear that the "absence of clear standards and the extremely broad approach taken by some courts have operated to adversely affect national labor policy in several important ways"[10] because "unions have considered it more prudent to process clearly nonmeritorious grievances all the way through the grievance procedure and on to arbitration, lest they be accused of breaching their duty of fair representation."11/ Since we are living in a very litigious society these days, the result has been clogged grievance and arbitral channels, a proliferation of cases before the NLRB and the courts, and an expenditure of a substantial amount of time and financial resources by management and union officials. It is these factors which the Authority should consider in deciding what test or standard should be followed in federal sector cases.

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[10] NLRB General Counsel Memo No. 79-55, Labor Relations Yearbook - 1979, at 341-342 (1979).

C. The NLRB's View that Something More Than Negligence is Required for Union Action or Inaction to be Considered "Arbitrary."

In 1974, the NLRB issued a most significant decision in Great Western Unifreight12/ in which it concluded as follows:

> From the above court and Board decisions, it is clear that negligent action or nonaction of a union by itself will not be considered to be arbitrary, irrelevant, invidious, or unfair so as to constitute a breach of the duty of fair representation violative of the Act. Something more is required. In the instant case, the modified complaint merely alleges only that the Respondent negligently failed and refused to timely process the meritorious grievance to the serious detriment of the Charging Party. Nothing more is charged. Absent an allegation showing something more than negligence alone, we conclude that the negligent conduct of the Respondent alleged herein does not constitute by itself a breach of the duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

In its discussion of prior cases the NLRB cited a case13/ in which the union failed to refer for employment an employee whom it had neglected

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11/ Id. at p. 2.

12/ General Truck Drivers, Chauffeurs and Helpers Union, Local No. 692, IBT (Great Western Unifreight System) and Marion Boyd Lee, 209 NLRB No. 52. The current Board is also following the test that "something more than mere negligence" is required. See Office and Professional Employees International Union, Local No. 2, AFL-CIO, 268 NLRB No. 207 (Feb. 29, 1984).

13/ Local 18, International Union of Operating Engineers, 144 FLRA 1365 (1963).

to register at the hiring hall. "Mere forgetfulness or inadvertent error," the NLRB held, "is not the type of conduct that the principles of Miranda were intended to reach." Also cited by the NLRB was a First Circuit decision[14] involving a union's negligence in failing to discover a defect in an employer's machine with the result an employee was injured. The court held that the NLRA, as amended, "imposes upon the exclusive representative only a duty of good faith representation, not a general duty of due care."

From the foregoing it would appear that the NLRB - whose decisions, of course, are not binding upon the Authority - has chosen a narrow standard more in accord with the Lockridge-Hoffman-Lewis approach.

D. Decisions of the FLRA Interpreting the Federal Service Labor-Management Relations Statute.

Section 7114(a)(1) of the Statute provides that a labor organization is "responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." To date, the cases issued by the Authority interpreting the Statute[15] have only involved representing employees "without regard to labor organization membership." Tidewater Virginia Federal Employees Metal Trades Council/IAM, Local 441, 8 FLRA No. 47 8 FLRA 217 (March 19, 1982);[16] American Federation of Government Employees, Local 1778, AFL-CIO, 10 FLRA No. 62, 10 FLRA 346 (October 8, 1982); National Treasury Employees Union, 10 FLRA No. 91, 10 FLRA 519 (November 23, 1982); and Overseas Education Association, 11 FLRA No. 75, 11 FLRA 377 (1983).

In only one case has the Authority had an opportunity to address the issue of whether negligence alone violates the duty of fair representation. American Federation of Government Employees, Local 987, 3 FLRA No. 115, 3 FLRA 717 (1980). But that case sheds no light on the subject because the Authority adopted the Chief Judge's decision without comment, except to say that its decision "was based solely on the basis of E.O. 11491, as amended" and "does not prejudge in any manner either the meaning or application of related provisions in the new Statute or the result which would be reached by the Authority if the case had arisen under the Statute rather than the Executive Order." Accordingly, to the extent the General Counsel relies on this case as precedent, such reliance is misplaced.[17/] However, as I indicated at the beginning of this decision the present case presents an opportunity for the Authority to establish its own standard.

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[14] Brough v. United Steelworkers of America, 437 F.2d 748.

[15] For Authority decisions concerning Executive order 11491, see National Treasury Employees Union, Chapter 202, 1 FLRA No. 104, 1 FLRA 910 (1979); and Federal Aviation Science and Technological Assn. Div., NAGE, 2 FLRA No. 103, 2 FLRA 802 (1982).

[16] In Tidewater there was a brief discussion of negligence and perfunctoriness but the case really turned on the fact the union acted in bad faith in accord with its well-entrenched policy of not initiating grievances for nonunion members. Absent such evidence of bad faith, it is a matter of speculation as to whether the Authority would have adopted the General Counsel's request to use the broad Ruzicka test.

E. The General Counsel's Position on the Applicable Standard.

In her brief, Counsel for the General Counsel concedes that federal courts do not consistently agree on the essential elements of the duty of fair representation" and that "mere negligence by the union in processing a grievance does not rise to the level of misconduct necessary to support an action for a breach of the duty of fair representation. . . ." She notes, however, that gross negligence by a union in processing a grievance is the type of "arbitrary" conduct needed to establish a breach of the duty of fair representation." (Citing, Robesky, Ruzicka, Dutrisac, supra.)

With specific reference to Crawford (Case No. 4-CO-20022), the General Counsel's brief states:

> As the Sixth Circuit stated in Ruzicka, supra, "[W]hen a union makes no decision as to the merit of an individual's grievance but merely allows it to expire

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17/ Also misplaced is the General Counsel's reliance on Overseas Education Association, 11 FLRA No. 75, 11 FLRA 377 (1983), a case in which the Union refused to assist an employee, who was seeking information about a grievance, because of his nonmembership in the Union. Because this case involved discriminatory conduct, and not negligence, it is inapposite.

> by negligently failing to take a basic and required step toward resolving it, the union has acted arbitrarily and is liable."[18]

And, in reference to Dixon (Case No. 4-CO-30012), the brief states:

> Thus, Counsel for the General Counsel asserts that the Union's callous indifference to Dixon's plight is yet another example of a case where the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim. Under the circumstances, there is no public policy to be furthered by shielding the Union from consequences of its failure to discharge its duty to fairly represent Dixon. See, e.g., Dutrisac, and Robesky, supra. Counsel for the General Counsel urges the Administrative Law Judge to conclude, as the court concluded in Dutrisac, supra "that the union should be responsible for a total failure to act that is unexplained and unexcused."

There is no question, therefore, that the General Counsel is asking the Authority to adopt a more stringent and broader standard for federal employee unions than what the NLRB has adopted for unions representing employees in the private sector.

F. The Respondent's Position on the Applicable Standard.

Respondent submits that the proper standard is intentional misconduct as stated by the Seventh Circuit in Hoffman, supra. That circuit explicitly set forth the standard in Graf, supra, 697 F.2d at 778, as follows:

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[18] But, see Journeyman Pipe Fitters Local 392 v. NLRB, 712 F.2d 225 (6th Cir. 1983), a recent decision by the same Circuit Court which authored Ruzicka. The Court found that a union which failed to maintain a list of job applicants as a means of referring employees through its exclusive hiring hall did not breach its duty of fair representation. The Court noted an absence of evidence of "hostility," "discriminatory motive," lack of "good faith," and concluded that, at worst, Sullivan (the business agent) exercised poor judgment. The Court then said: "Negligence, poor judgment or ineptitude are insufficient, standing alone, to establish a breach of the duty of fair representation. NLRB v. American Postal Workers, Union, 618 F.2d 1249, 1254 (8th Cir. 1980)."

> The union has a duty to represent every worker in the bargaining unit fairly but it breaches that duty only if it deliberately and unjustifiably refuses to represent the worker.

In his brief, Counsel for Respondent sets forth the following arguments:

> There are at least three reasons why a broader standard would be inappropriate. First, a broader standard would permit the FLRA continually to impose what it would have done in the same situation. Such intervention would be destructive of good bargaining relationships since an agency would never be sure that the negotiated grievance procedure was viable or final. In addition, the union's representation would be undermined. It would constantly act as if it were under review, causing inhibited exercise of its discretion. Employees would turn to the FLRA in droves when dissatisfied with the outcome of their grievances. Eventually, the union would lose its significance and become too weak to act effectively or at all. The unions must be permitted to exercise discretion freely, to review grievance procedure and policies routinely, and to correct admitted mistakes in grievance handling when they occur. (There should be no naive or idealistic impression that mistakes will not occur.)
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> Second, it is necessary to protect the union's financial resources and thereby its effectiveness. Federal sector labor organizations cannot compel the payment of dues. Often they represent units which dwarf their dues-paying membership. A broader standard, that the General Counsel no doubt advocates, will deplete the union's meager coffers, especially when the General Counsel is seeking monetary relief for the charging parties as here.
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> Finally, the CSRA explicitly states "without discrimination" in § 7114(a)(1). It does not say "arbitrary" as it could have since Vaca was decided well before the CSRA was enacted. It is difficult to imagine "discrimination" in any sense other than intentional and deliberate. The existing case law is helpful for sake of analysis but the private sector statutes are silent with respect to the duty. The CSRA is not. The statutory language itself should control the breach of the duty of fair representation in the federal sector.

Counsel's brief also discusses the 1983 decision of the Seventh Circuit in Graf, supra, where the court reexamined and adhered to its 1981 decision in Hoffman v. Lanza, Inc. Daniel Graf was a discharged employee who requested his union representative to file an appeal which had to be filed within 60 days in accordance with the grievance procedure. The union representative wrote out the appeal by hand and stuck it in his pocket together with several others only to find after 60 days had expired that it was still there in his pocket. The union agent testified that his failure to submit the appeal was inadvertent. There was no evidence of bad motive. It was clear to the court that the agent's failure to dig Graf's appeal out of his pocket was pure negligence. But the court said that the union agent's "lapse of memory" does not signify such a "reckless indifference to Graf's interests that it can be called intentional misconduct." In its brief, Counsel also made these comments about the Graf decision:

> The appellate court also considered a few practical considerations in reaching a narrow standard of liability. First, competence is in the union's self-interest. Union officers "must render an adequate level of 'constituent service' to retain [their] position[s]." 697 F.2d at 778. And in turn the union must have competent stewards if it expects to remain the exclusive representative of the employees. Thus, both the stewards/officers and the union have incentives to exercise care and diligence in handling of grievances independent of incentives provided by the potential for liability.
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> Secondly, union officers are not professional advocates. They are hourly workers who perform the duties of stewards on a part-time, unpaid basis. They cannot be held to the same standard as attorneys.

Finally, Counsel points out that under Section 7121(b)(3)(B) of the Statute, negotiated grievance procedures must provide federal employees with the right to present grievances on their own behalf. "If bargaining unit members cannot trust the Local to represent their interests, they will file their own grievances. They will question whether they are receiving any value for their union dues. If they conclude that they are not, they will elect new officers or seek to decertify. Thus, it is in the union's best interest for its agents to do the best that it can for the bargaining unit."

Conclusions of Law

A. Rejecting the General Counsel's Broad Standard.

I believe the Authority should reject, as I do, the broad standard of Ruzicka and Dutrisac whereby negligence may serve as a basis for concluding that a union's conduct is arbitrary. First, such a standard misinterprets the Supreme Court's decision in Vaca and completely ignores Lockridge where the Supreme Court stated that "the very distinction . . . between honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment, on the other hand, needs strictly to be maintained." As the Lewis court stated: "some degree of conscious misfeasance or dereliction is contemplated by the 'arbitrary' standard as set forth in Vaca." As the First Circuit said in Brough, supra, the exclusive representative has a duty of good faith representation and not a "general duty of due care."

Second, not all bargaining units in the federal sector are composed of employees at the higher GS-grade levels; some are composed mainly of employees at the lower end of the GS-grade scale. Similarly, not all employees are well-educated, intelligent and sophisticated. Some bargaining units are composed primarily of employees of minority status, especially if located in certain geographical areas. These are facts of life which have to be recognized because, as the court said in Graf, "union officers are not professional advocates. They are hourly workers who perform the duties of stewards on a part-time, unpaid basis. They cannot be held to the same standard as attorneys." With this in mind, I believe it would be unfair to impose such a broad standard and such a high duty of care upon federal employee union representatives.

B. Rejecting the NLRB's Standard for the Private Sector.

With respect to the NLRB's test of proving "something more than negligence," I conclude that it has both advantages and disadvantages. On the one hand, it has the advantage of eliminating "mere negligence" cases from the NLRB's case flow while at the same time not precisely defining "something more" and leaving this to case-by-case litigation. On the other hand, it has the disadvantage of encouraging litigation to flesh out the meaning and the parameters of "something more" which by itself lacks specificity. While the NLRB may conclude that its test is appropriate in the private sector, I am inclined to advocate an even narrow standard in the federal sector.

C. Adopting a Narrow Standard for Federal Sector Employees.

As noted at the beginning of this decision, the Supreme Court has held that "federal law governs." Therefore, the Vaca standard followed by the courts and the NLRB is the applicable standard for cases arising under the Federal Service Labor-Management Relations Statute. That standard requires finding a breach of the duty of fair representation where the union's conduct is arbitrary, discriminatory or in bad faith.[19/] To the extent that some confusion has arisen as to the kinds of conduct deemed "arbitrary," I agree with, and adopt, the excellent analysis of the Seventh Circuit Court of Appeals in its 1981 decision in Hoffman v. Lanza, 658 F.2d 519 (1981) where the court concluded that the Vaca standard required a finding of intentional misconduct before a union may be found to have breached its duty. When the Seventh Circuit in Graf, supra, recently reconsidered its Hoffman decision, it restated the test as follows:

> The union has a duty to represent every worker in the bargaining unit fairly but it breaches that duty only if it deliberately and unjustifiably refuses to represent the worker.

Respondent persuasively argues that the Authority should adopt this standard. I agree for the following reasons.

First of all, my reading of the Supreme Court decisions cited herein convinces me, as it did the Seventh Circuit and other courts, that the Supreme Court was speaking of intentional union misconduct. In Graf the use of the word "deliberately" adds nothing to its previous Hoffman standard because this is a synonym for "intentionally." However, the use of the word "unjustifiably" is a helpful addition because it separates intentional acts into two categories: justifiable and unjustifiable. In the former category may be included a union's decision, based upon a rational and reasonable exercise of judgment, not to file a grievance at Step One, to settle grievances at any stage, or not to go to arbitration on every grievance.[20/] In the latter category may be included those

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[19/] Accordingly, I reject Respondent's argument, supra, that some significance should be placed in the fact that Section 7114(a)(1) does not use the word "arbitrary." Counsel cites no legislative history to support the contention that the phrase "without discrimination" in Section 7114(a)(1) was intended by Congress to narrow the Vaca standard in any way. Moreoever, Section 7114(a)(1) entitles a union which has been accorded exclusive recognition the right to act for all unit employees. In Humphrey v. Moore, supra, 375 U.S. 335, 342, the Supreme Court noted that the duty of fair representation has its implied statutory basis in the union's role as "exclusive" bargaining agent with "exclusive power to represent all employees of a bargaining unit."

[20/] The Supreme Court has recognized that a union has such discretion. See, for example, Vaca supra, at pp. 191-193.

cases where the courts have rejected the union's explanation for its conduct, instead finding the conduct or inaction was based upon invidious and irrelevant considerations, bad faith, hostility, fraud, deceitful action, dishonesty, or irrational treatment - all of which come within the meaning of unjustifiable."[21] Frankly, I don't think it should make too much difference whether the Authority adopts the Hoffman language of "intentional misconduct" or the Graf language of "deliberately and unjustifiably." I am inclined to prefer the latter simply because it is more specific and should be easier to apply.

The adoption of a narrow standard for federal employee unions is consistent with the trend today towards less regulation by the government. It also reflects a desire to be sensitive to the peculiar problems of federal employee unions. As Respondent points out, federal unions cannot compel the payment of dues and they often represent units which drawf their dues-paying membership. Utilization of grievance procedures requires a union to have competent representatives. Resort to arbitration requires financial resources. Not every bargaining unit provides either the manpower or the money. For this reason, the Authority should limit its involvement in a federal employee union's internal affairs to determining only whether the union is representing all employees in unit fairly; i.e., without discrimination. If employees are not satisfied with how well they are being represented, they can vote for new officers or seek to decertify the union and, perhaps choose another union. In my opinion the Authority should not follow the example of those courts which have become unnecessarily involved in looking over the shoulder of union representatives and second-guessing their judgment. Rather, the Authority should limit its intervention to those cases where the General Counsel has proven that the union has deliberately and unjustifiably refused or failed to represent a bargaining unit employee. It is this standard which I shall apply herein.

D. Case No. 4-CO-20022 (Kenneth A. Crawford)

Section 7118 of the Statute provides that a "preponderance of the evidence" is required in order to find a labor organization has engaged in an unfair labor practice. The Consolidated Complaint alleges in paragraph 9 that (1) on several occasions in June and July after the grievance was filed, Crawford attempted unsuccessfully to contact the Union for the purpose of inquiring about the status of his grievance, and (2) that the Union officials failed and refused to provide him with such information, and (3) that Respondent took no further action with respect to the grievance.

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[21] Excluded from this category is union conduct or inaction resulting from gross or mere negligence, an honest mistake, ineptitude, poor judgment or carelessness.

As to (1) I credit Crawford's testimony and conclude that this allegation is supported by the evidence. As to (2) I find that the Union failed to inform Crawford of the status of his grievance; however, the evidence does not support a finding that Respondent refused to provide such information. There is no refusal because there was no specific request actually communicated to the Union. As to (3) there is no dispute that the Union took no further action on the grievance. No attempt was made to refile at Step One, or to ask Doherty to reconsider his Step Three decision, or to go to arbitration, or take any other action. Rather, the Respondent's President simply took no action at all.22/ The issue, therefore, is whether the Union's undisputed failure to take any further action with respect to Crawford's grievance is the kind of conduct which constitutes a breach of duty of fair representation.

As discussed and concluded above, the Vaca standard of "arbitrary, discriminatory, or in bad faith" is applicable here, and in order to prove a breach of the duty of representation the General Counsel must prove by a preponderance of the evidence that the union "deliberately and unjustifiably" failed or refused to represent an employee. Applying this standard to the instant facts, the question is why did the Union fail to take any action? The answer, as suggested by Respondent's counsel, is quite clear. This is a classic case of ineffective and inept representation, but even if the Union's conduct were characterized as negligence, it would not be actionable. There is absolutely no evidence to suggest that the Union's inaction was malicious, discriminatory or in bad faith. There is no evidence of hostility towards Crawford by Weaver, who hardly knew him, or by Cottle, who represented him in meetings and gave him assistance both with his suspension and his subsequent removal. There is no evidence that the Union's failure to take any further action on the grievance was motivated by an intent to discriminate against Crawford or an intent to treat him unfairly. In short, there is an absence of evidence to serve as a basis for imputing to the Union an

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22/ Both VAMC and the Union demonstrated their ignorance of the applicable grievance procedure. Thus, the suspension memo to Crawford (G.C. Exh. No. 8) erroneously instructed him that he had to file his grievance within 15 calendar days. Actually the new Master Agreement then in effect provided a grievant with 30 days in which to file. Thus, when Weaver received Doherty's May 26 memo she (or Crawford) still could timely file at Step One. It's not clear from this record whether Weaver's decision not to refile at Step One was influenced by her unfamiliarity with the new contract which was not distributed until March (see G.C. Exh. No. 2 Attachment) or whether she may have been mislead by the agency's erroneous instructions as to the 15-day filing period.

intention on its part to deliberately and unjustifiably fail to represent Crawford properly. What happened here is that Union President Weaver received Doherty's denial of the grievance filed at Step Three and she simply concluded it was futile to "go back to the Director" (TR 132). It apparently did not even occur to her to attempt to refile at Step One or to notify Crawford so that he could do so.

On the basis of the foregoing and my review of the entire record, I conclude that the General Counsel has not proven by a preponderance of the evidence that Respondent deliberately and unjustifiably failed to inform Crawford or to take any further action on the grievance. For this reason I do not find that Respondent breached its duty of fair representation. Accordingly, I find and conclude that Respondent did not fail to comply with Section 7114(a)(1) in violation of Section 7116(b)(8), and did not interfere with, restrain and coerce employees in the exercise of their rights guaranteed under the Statute, in violation of Section 7116(b)(1).

Case No. 4-CO-30012 (Clara Mae Dixon)

Section 7118 of the Statute provides that a "preponderance of the evidence" is required in order to find that a labor organization has engaged in an unfair labor practice. For the reasons set forth above in paragraphs 13-16, supra, I find that the General Counsel has not established by a preponderance of the evidence that Dixon asked the Union to file a grievance on her behalf. Assuming, arguendo, that Dixon's request for "help" may be construed as a request to file a grievance, I do not find that the Union either failed or refused to file the grievance.[23] Cottle did not refuse to file a grievance but, rather, asked Dixon to return when she actually received a written letter of discharge. Dixon did return but, after talking to Weaver, said she had to get more papers from home. This time she did not return and, therefore, did not fully cooperate. Weaver did not tell her there was nothing she could do. On these facts, I find and conclude that Respondent did not fail or refuse to represent Dixon.[24] Therefore, Respondent did not breach its duty of fair representation and thereby violate Section 7116(b)(1) and (8) as alleged.

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[23] In view of this decision, I do not have to decide whether a Union may violate its duty of fair representation by refusing to file a grievance even though the Authority might later conclude that the grievance procedure is inapplicable because Congress did not intend grievance and arbitration procedures negotiated under the Statute to cover grievances concerning the termination of probationary employees. See U.S. Department of Labor, Labor-Management Relations Administration, Cleveland, Ohio, 13 FLRA No. 109 (Jan. 16, 1984) in which the Authority apparently acquiesced in the Circuit Courts decision in United States Department of Justice, Immigration and Naturalization Service, 709 F.2d 724 (D.C. Cir. 1983).

Ultimate Conclusions

Having found that Respondent did not engage in any unfair labor practices by the actions and conduct described above, and therefore has not violated Section 7116(a)(1) and (8) as alleged in the Amended Consolidated Complaint, I recommend that the Authority issue the following:

ORDER

That the Complaints in Case Nos. 4-CO-20022 and 4-CO-30012 be, and they hereby are, DISMISSED.

FRANCIS E. DOWD
Administrative Law Judge

Dated: March 23, 1984
Washington, D.C.

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[24] Assuming, *arguendo*, that this record would support a factual finding that Respondent failed and refused to file a grievance for Dixon, I would nevertheless be unable, on this record, to impute to Respondent an intent to deliberately and unjustifiably refuse to represent Dixon in violation of its duty of fair representation.

23 FLRA No. 93

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 52

Union

and   Case No. 0-NG-1163

INTERNAL REVENUE SERVICE
AUSTIN DISTRICT

Agency

ORDER DISMISSING PETITION FOR REVIEW

This matter is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute and section 2424.1 of the Authority's Rules and Regulations on a petition for review of negotiability issues filed by the Union. For the reason set forth below, the Union's appeal must be dismissed.

From the Union's petition for review and the Agency's statement of position, it appears that the local parties signed a negotiated agreement on May 10, 1985. It also appears that a controlling national agreement between the Internal Revenue Service and the National Treasury Employees Union was in effect at that time. The local parties' agreement was submitted for agency head approval under section 7114(c)(4) of the Statute. The Agency head's designee disapproved a number of provisions of the agreement. The written disapproval was served on the Union by mail on July 23, 1985. In a motion subsequently filed with the Authority the Union took the position that the Agency head's disapproval was not timely under section 7114(c). In its response to the Union's motion, the Agency indicated that neither the controlling national agreement nor the Agency's regulations contain any time limits for Agency head disapproval of local supplemental agreements.*/

Section 7114(c) of the Statute establishes a process for approval of negotiated agreements by agencies. Section 7114(c)(1) provides that an agreement between an agency and an exclusive representative "shall be subject to approval by the head of the agency." Section 7114(c)(2) establishes a 30-day time limit for this approval process. However, the agency by agreement with the exclusive representative, by internal agency regulation, or other means can designate officials below the level of the agency head to exercise the approval authority referred to in section 7114(c)(1). In addition, section 7114(c)(3) provides that an agreement automatically becomes effective and binding on the parties on the expiration of the 30-day period prescribed in section 7114(c)(2), if the agency head (or the agency head's designee) has not acted to approve or disapprove the agreement within that period.

Section 7114(c)(4) supplements the provisions of section 7114(c)(1), (2), and (3). Under section 7114(c)(4), the agency and the exclusive representative may negotiate procedures for approving locally negotiated agreements subject to a higher level controlling agreement. In the absence of such a negotiated approval procedure, section 7114(c)(4) also authorizes an agency to establish such procedures under its regulations. Therefore, while Congress has provided in section 7114(c)(2) that 30 days is sufficient time to accomplish review of a collective bargaining agreement, under section 7114(c)(4) the parties to the controlling national agreement or the agency by regulations, may prescribe an approval procedure, including a different time limit, for review of local agreements. A time limit established under section 7114(c)(4) supplants the 30-day time limit contained in section 7114(c)(2) of the Statute which otherwise would apply. Where, however, neither the controlling agreement nor agency regulations prescribe any time limit for completion of review by the agency head or a designee, the time limit mentioned in section 7114(c)(2) and (3) applies. Compared to having no time limit, reading the Statute to apply the 30-day limit of those subsections where the parties themselves have not provided otherwise best accelerates the review process and ensures that locally negotiated agreements become effective as expeditiously as possible.

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*/ In view of the result in this case the Authority finds it unnecessary to rule separately on the Union's motion or on the timeliness of the Union's response to the Agency's Statement of Position.

In this case, neither the controlling national agreement nor the Agency's regulations provide any time limits for review of the parties' locally negotiated agreement. Thus, the 30-day time limit of section 7114(c)(2) is applicable. The local parties' supplemental agreement was executed on May 10, 1985, and submitted for agency head review and approval. However, the Agency's disapproval was not served on the Union until July 23, 1985, or 73 days after the agreement was executed. Therefore, under section 7114(c)(3) of the Statute, since the Agency's disapproval was not served on the Union within the 30-day period prescribed in section 7114(c)(2), the local agreement went into effect on June 10, 1985, the 31st day after it was executed.

Since the entire agreement, as negotiated and executed by the local parties, became effective on June 10, 1985, the Agency's subsequent disapproval does not raise a negotiability dispute concerning the terms of such agreement which is cognizable under section 7117 of the Statute.

Our conclusion that this case does not present a negotiability dispute does not, of course, mean that any provisions in the agreement which are contrary to the Statute or any other applicable law, rule or regulation, are enforceable. Rather, as the Authority has repeatedly held in like cases, a question as to the validity of such provisions may be raised in other appropriate proceedings (such as grievance arbitration and unfair labor practice proceedings) and, if the agreement provisions are found to be violative of the Statute or any other applicable law, rule or regulation, they would be void and unenforceable. See American Federation of Government Employees, AFL-CIO, Local 1858 and U.S. Army Missile Command, Redstone Arsenal, Alabama, 4 FLRA 361 (1980), motion for reconsideration denied, 4 FLRA 363 (1981). These requirements are applicable to agency head review of all collective bargaining agreements, including local agreements which are subject to national or other controlling agreements at higher levels of an agency, as is involved in this case. National Federation of Federal Employees, Local 1862 and Department of Health, Education and Welfare, Public Health Service, Indian Health Service, Phoenix, Arizona, 3 FLRA 182 (1980); American Federation of Government Employees, AFL-CIO, Local 1625 and Fleet Combat Training Center, Atlantic, U.S. Department of the Navy, 14 FLRA 162 (1984).

Since the Union's petition for review does not meet the conditions for review under section 7117 of the Statute and section 2424.1 of the Authority's Rules and Regulations, and apart from other considerations, it is dismissed.

Issued, Washington, D.C., October 30, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

23 FLRA No. 94

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

OFFICE OF PERSONNEL MANAGEMENT

Respondent

and

Case No. 3-CA-50464

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 32, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority, under section 2429.1(a) of the Authority's Rules and Regulations, based on a stipulation of facts by the parties, who have agreed that no material issue of fact exists. Briefs for the Authority's consideration were filed by the Respondent and by the General Counsel. The complaint alleges that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by unilaterally changing a past practice of permitting employees in the Office of Personnel Management's Job Information and Testing Center (Respondent JIC) to take their lunch break at any time between 11:30 a.m. and 1:30 p.m. and by refusing to negotiate on the decision and its impact and implementation on unit employees. For the reasons stated below, we find no merit to these allegations and will dismiss the complaint in its entirety.*/

II. The Facts

The American Federation of Government Employees, Local 32, AFL-CIO (Union) is the exclusive representative of Respondent's professional General Schedule and

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*/ Member Frazier's separate opinion is set forth, *infra*.

nonprofessional Wage Grade and General Schedule employees in the Washington, D.C. metropolitan area. On June 7, 1985, Respondent JIC held a staff meeting at which time unit employees were reminded of JIC policy requiring that two or three employees be available from 11:30 a.m. through 1:30 p.m. in order to answer telephone calls. They were asked to voluntarily cover the telephones during these hours.

The parties agree that the Respondent's policy of allowing employees to take their one hour lunch break anytime between 11:30 a.m. through 1:30 p.m. had become an established past practice. The Respondent, without notifying the Union, unilaterally implemented a written lunch schedule on July 15 for JIC employees. The written lunch schedule directed specific employees to take their one hour lunch break at either 11:30 a.m. or 12:30 p.m. and resulted in five or six employees becoming available for the required telephone coverage. Subsequently, by letter dated July 24, 1985, the Union requested bargaining over Respondent's decision to change lunch breaks as well as its impact and implementation. The Respondent refused to negotiate over its decision to schedule lunch breaks.

The parties' negotiated collective bargaining agreement includes an Alternative Work Schedule Experiment agreement in which paragraphs F and G of section III entitled "Tour of Duty" provide:

> F. In making schedule adjustments to accommodate coverage and operational requirements, the use of volunteers, or other voluntary methods, shall be the preferred means of resolving conflicts. If such means do not serve to provide a resolution, other methods may be adopted which are fair and equitable to the employees involved.
>
> G. Management will determine in advance all coverage requirements necessary. Such determinations shall be subject to the grievance procedure.

III. Positions of the Parties

The Respondent argues that the adjustment in lunch schedules did not constitute a unilateral change in an established past practice, but rather was a reaffirmation in writing of an existing policy and long established practice to ensure the coverage of telephones between 11:30 a.m. and 1:30 p.m. It contends the only change that occurred was that employees could no longer adjust their lunch schedules between 11:30 a.m. and 1:30 p.m. Even assuming that there was a change in past practice, the Respondent argues that bargaining over any adjustments in lunch schedules was waived by the Union under the parties' negotiated collective bargaining agreement. Additionally, the Respondent argues that any dispute concerning differing and arguable interpretations of the provisions in the parties' agreement should be pursued by the Union under the parties' negotiated grievance and arbitration procedure and not through an unfair labor practice procedure.

The General Counsel argues that the change in lunch schedules to ensure adequate telephone coverage went beyond a reaffirmation of the Respondent's policy. Rather, the change was a permanent assignment of employees concerning their non-work schedule, for example, when employees must take their lunch breaks. The General Counsel contends that this is a unilateral change in a negotiable condition of employment. Further, the General Counsel argues that paragraphs F and G of section III in the negotiated agreement do not establish a clear and unmistakable waiver by the Union of its right to negotiate over the subject matter since those provisions are silent on the scheduling of lunch breaks.

IV. Analysis

A. Change in Conditions of Employment

It is clear from the parties' stipulation of facts that the Respondent changed an established past practice that allowed unit employees to take their one hour lunch break anytime between 11:30 a.m. through 1:30 p.m. to one that required that the lunch break be at a fixed time, either 11:30 a.m. or 12:30 p.m. As acknowledged by the Respondent, employees could no longer adjust their lunch hour as had been their previous practice.

B. Waiver

In our view, by entering into agreement with Respondent on paragraphs F and G noted above, the Union clearly and unmistakably waived its right to bargain over the Respondent's subsequent decision to change lunch schedules to ensure adequate telephone coverage. In so concluding, we view the Tour of Duty contract provision as constituting agreement that the Respondent can determine coverage requirements, which dictate the lunch hour scheduling at issue in this case, and that the forum for the resolution of such determinations is the grievance procedure. By agreeing to these provisions, the Union waived its right to prior negotiations on such a scheduling change. See Defense Logistics Agency, Defense General Supply Center, Richmond, Virginia, 20 FLRA No. 62 (1985).

V. Conclusion

We have considered all the facts and circumstances of this case, including the positions of the parties, and conclude that the Respondent did not violate section 7116(a)(1) and (5) of the Statute, as alleged. Accordingly, we shall dismiss the complaint.

ORDER

IT IS ORDERED that the complaint in Case No. 3-CA-50464 be, and it hereby is, dismissed in its entirety.

Issued, Washington, D.C., October 31, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

Member Frazier, Concurring:

I agree with the conclusion of my colleagues that the complaint must be dismissed. However, I base my conclusion on a finding that, in the circumstances, no unilateral change in conditions of employment took place. I reach this finding as follows. It is stipulated that there was an established practice at the Activity for employees to take their one hour lunch break "anytime from 11:30 a.m. through 1:30 p.m. as long as two or three employees were available for telephone coverage." (Stipulation § 6(b), emphasis added.) Clearly, the right of the employees to set times of their lunch hour was not unconditional. An employee's ability to select "anytime" during that two-hour period was conditioned on the availability of employees for telephone coverage. The requirement for adequate telephone coverage was a part of the established practice.

The collective bargaining agreement provides, among other things, that the use of volunteers, or other voluntary methods, shall be the preferred means of resolving conflicts in making schedule adjustments (section III, Paragraph F), and that management will determine in advance all coverage requirements necessary, subject to the grievance procedure. (Section III, paragraph G.) The Activity's supervisor, between June 7 and July 15, 1985, observed no phone coverage on several occasions between 12:30 p.m. and 1:30 p.m.; on June 14, 1985, pursuant to the above contract provisions, employees were reminded of the need to voluntarily check with co-workers before leaving for lunch to ensure adequate phone coverage. (Stipulation §§ 7 and 8.) Thus, management sought voluntary employee action to meet the coverage requirements. On July 15, 1985, the supervisor implemented the written lunch schedule whereby specific employees were directed to take their one hour lunch break at either 11:30 a.m. or 12:30 p.m. in order to insure adequate telephone coverage. (Stipulation § 9.) Apparently concluding that "voluntary methods" had not "serve[d] to provide" a resolution of the problem management then made "schedule adjustments to accommodate coverage and operational requirements."

These actions did not constitute a unilateral change in conditions of employment. Instead, they amounted to nothing more than an attempt by management to insure that the existing requirement for adequate telephone coverage was met in accordance with the provisions of the collective bargaining agreement.

If the Union believes that the Activity failed to comply with the provisions and procedures of the collective bargaining agreement in this instance, it may, of course, resort to the negotiated grievance procedure. As noted, for example, section III, paragraph G subjects determinations of coverage requirements to the grievance procedure. Also, such issues as whether volunteers or a voluntary method of coverage were tried, whether they were successful, and whether the other method eventually adopted by management (i.e., the setting of hours) was fair and equitable would all appear to be subject to the grievance procedure.

Since I find that no violation of the Statute has been established because there was not a unilateral change in a condition of employment, I find it unnecessary to reach the waiver issue addressed by my colleagues.

Issued, Washington, D. C., October 31, 1986

Henry B. Frazier III

Henry B. Frazier III, Member

23 FLRA No. 95

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES
SERVICE EMPLOYEES INTERNATIONAL
UNION, AFL-CIO

Union

and

Case No. 0-NG-1300

MISSOURI NATIONAL GUARD

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and concerns the negotiability of one Union proposal. The proposal, which appears in the Appendix to this Decision, essentially provides that National Guard civilian technicians will be given the option of wearing standardized civilian attire rather than the military uniform. Based on the following, we find the proposal nonnegotiable.

II. Positions of the Parties

The Union asserts that its proposal is an appropriate arrangement for employees adversely affected by the Agency's decision to require civilian technicians to wear the military uniform and is negotiable under section 7106(b)(3) of the Statute. In support of its contention, it relies on the Authority's decision in American Federation of Government Employees, Local 217 and Veterans Administration Medical Center, Augusta, Georgia, 21 FLRA No. 13 (1986). It characterizes that decision as standing for the proposition that, while the decision to require employees to wear a uniform may be a management right, the type of uniform is negotiable as an appropriate arrangement. It asserts that, in light of its decision in Veterans Administration, the Authority should reconsider its previous decisions on the issue of National Guard civilian technicians wearing the military uniform and requests that the Authority conduct a hearing on the matter. It further asserts that, when measured against the criteria which the Authority has articulated for determining whether a matter is negotiable as an appropriate arrangement,[1] this proposal constitutes an arrangement for adversely affected employees which does not excessively interfere with the Agency's right to determine its internal security practices.[2]

The Agency notes that the Authority has held that the requirement that civilian technicians wear the military uniform is a methods and means of performing work within the meaning of section 7106(b)(1) of the Statute. For example, Division of Military and Naval Affairs, State of New York, Albany, New York and New York Council, Association of Civilian Technicians, 15 FLRA 288 (1984), aff'd sub nom. New York Council, Association of Civilian Technicians v. FLRA, 757 F.2d 502 (2d Cir. 1985), cert. denied 106 S.Ct. 137 (1985). It argues that the Union's proposal in this case is not an appropriate arrangement because it excessively interferes with the Agency's right under section 7106(b)(1) in that it would totally eliminate the right to determine the methods and means of performing work.

III. Analysis and Conclusions

A. The Circumstances in Veterans Administration, 21 FLRA No. 13, Are Distinguishable from Those Present Here

In the Veterans Administration case, the record established that the purpose of requiring employees to wear a uniform was to allow ready identification of employees for security purposes. In that context, the Authority found that negotiation over the specific type of uniform did not interfere with the purpose for which the uniform requirement was adopted. However, the purpose of the uniform requirement insofar as National Guard technicians are concerned is different. The National Guard Bureau requires technicians to wear the military uniform to foster military discipline, promote uniformity, encourage esprit de corps, increase the readiness of the military forces for early deployment and enhance identification of the National Guard as a military organization.[3] Given that context, the type of uniform, i.e., a military uniform, is critical to achieving the purpose for which the Agency has adopted the uniform requirement.

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[1] National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986).

[2] Contrary to the Union's statement, the Agency has not asserted that the proposal conflicts with its right under section 7106(a) to determine its internal security practices.

In view of the different circumstances present in the two cases, no reconsideration of the Authority's previous determinations in the National Guard cases is called for and the Union's request for a hearing is denied.

B. The Union's Proposal Does Not Constitute an Appropriate Arrangement

The Union has identified several instances where it contends that employees have been adversely affected as a result of the Agency's requirement that they wear the military uniform. Assuming that the Union's contentions are accurate, the Authority finds that, in view of the relationship between the military nature of the uniform and the purpose for which the uniform requirement was adopted, a proposal allowing employees to elect to wear a nonmilitary uniform would negate the Agency's right to determine the methods and means of performing work. A proposal which in this manner totally abrogates the exercise of a management right excessively interferes with the right and is not negotiable as an appropriate arrangement under section 7106(b)(3). See American Federation of Government Employees, AFL-CIO, Local 3186 and Department of Health and Human Services, Office of Social Security Field Operations, Philadelphia Region, 23 FLRA No. 30 (1986) (Proposal 1).

This is not to say, however, that under all circumstances proposed exceptions to the uniform requirement must be found non-negotiable. See National Association of Government Employees, Local R3-84, SEIU, AFL-CIO and District of Columbia Air National Guard, 23 FLRA No. 73 (1986), in which the Authority found negotiable a proposal which excepted employees from the uniform requirement when engaged in specified labor-management activities. Thus, some portions of the Union's proposal which seek specific exceptions to the uniform requirement might be found negotiable, if severed from a proposed overall option of wearing nonmilitary attire. We do not consider this question further here. The Authority generally does not consider parts of a proposal separately, unless the parties specifically so request, which was not done in the present case. See Local 32, American Federation of Government Employees v. FLRA, 774 F.2d 498, 505 (D.C. Cir. 1985).

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[3] See Division of Military and Naval Affairs, State of New York, Albany, New York, 15 FLRA 288 (1984).

IV. Order

Pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C. October 31, 1986.

J. L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

Section 12.

A. Excepted Technicians throughout the State shall wear an agreed-upon Standard Civilian Attire (SCA).

B. Exception: Excepted Technicians who wish to remain in the military uniform shall, within 30 days from the date of approval of this Agreement, or 30 days from the date of employment, whichever comes later, notify the Technician Personnel Officer (TPO), in writing, of their intent to remain in the military uniform. Upon receipt of such notice by the TPO, they shall remain in the military uniform for the life of this Agreement.

C. The military uniform will continue to be worn by all excepted Technicians:

(1) When engaged in recruiting/retention activities, provided the Technicians have advance knowledge of such activities;

(2) When serving as a crew member or non-crew member, or riding as a passenger in a military aircraft;

(3) During all higher headquarters inspections or announced visits of officials higher than State Headquarters;

(4) When in TDY status to a military installation, unless such wear is exempted by policy guidance or regulation from higher authority;

(5) When working in Technician status in support of UTAs, AT, or any other military function involving Drill-Status Guardsmen (DSGs) in a military duty status; and

(6) When actively serving on a Base Defense Force.

D. Neither the Military uniform nor the SCA will be worn by Technicians:

(1) When in an official travel status while traveling by commercial or private transportation;

(2) When attending courses of instruction in a Technician status at locations other than military installations, facilities or complexes, except as required by the facility conducting the course;

(3) When serving as labor representatives while engaged in labor agreement negotiations; and

(4) While participating as data collectors during a Federal Wage System survey,

E. The Parties agree that the provisions of this Section of this Article will be strictly adhered to and that they will provide mutual support when correcting violations that might occur.

F. All SCA items of wear will be purchased, maintained and replaced at the personal expense of the Technician.

G. SCA, specified as follows for all members of the bargaining unit, will be uniform in style and color:

(1) Blue shirt with either long or short sleeves -

(A) When worn, SCA shirt will always be tucked in at the waist;

(B) A blue name tape, 1"X6", stenciled or embroidered with the Technician's last name, in black if stenciled, or black thread if embroidered, will be worn over the right pocket of the shirt, or in a similar position on the shirt if it has no pocket;

(C) The SCA shirt may be of cotton poplin, twill, chambray, nylon or knit.

(2) Full-length blue SCA trousers or slacks, or skirts, will be worn - those with belt loops will be worn with a plain black belt, leather, knit, or woven, with a plain open-face buckle. Blue jeans will not be worn.

(3) A blue jacket may be worn when required for an individual Technician's comfort, and a name tape of the same style and markings used on the SCA shirt will be worn in the same place on the jacket.

(4) As required by prevailing climatic conditions, a blue coat of fingertip or knee length, or an SCA parka with or without a hood, may be worn when required for the comfort of the individual Technician.

(5) When out of doors, the following type black or blue headgear may be worn -

(A) Baseball-type cap, or

(B) In cold weather, a knit stocking cap.

Local Commanders may, at their discretion, restrict wear of headgear on the flight lines.

(6) Footwear will be in a standard black color, low quarter or ankle length shoes, boots, or insulated boots;

(A) socks will be black of any weight preferred;

(B) overshoes may be worn when required and will be of standard plain design, pullover, buckle or zippered.

(7) Undershirts, if worn, will be plain, white, of T-shirt design, circular neck, without ornamentation of any kind, and must always be worn tucked into the trouser, slack or skirt waist.

(8) Blue sweaters, pullover, cardigan style, or zippered, with or without sleeves, may be worn for the comfort of the individual Technician.

(9) Ponchos, raincoats or rain suits may be worn when required by foul weather conditions, and will be safety yellow.

(10) Technicians who wear the SCA and who continue to work during a pregnancy will wear the SCA modified for maternity wear; Technicians who wear the military uniform and who continue to work during a pregnancy will follow the provisions of the appropriate AR or AFR.

(11) No ornamentation other than the name tape specified in G(1)(B) and (3) above, no insignia of military rank, no display or membership pins, buttons, jewelry or like items will be worn on the SCA items of wear at any time.

H. It will be the responsibility of each Technician who wears the SCA to maintain his personal attire in a serviceable and presentable manner and condition and he will replace frayed, faded, torn, indelibly spotted, or chemically eroded items with least possible delay.

I. Military grooming standards will be adhered to by all Technicians at all times, to enable achievement of a smooth and rapid transition of Technicians to military status in emergencies, in keeping with the missions of the Missouri National Guard and of the Agency; grooming standards will be as specified in the appropriate AR or AFR.

J. No mixture of military uniform items and SCA items, or of normal civilian non-military, non-SCA items and SCA items will ever be permitted and wear of any mixed attire will be forcefully discouraged by both Parties except for required safety items.

K. If Technicians select the SCA, the military uniforms issued to them in excess of their regular military allowance will be turned in to their military unit within 30 days after the date the SCA-wear option becomes effective at their work location.

L. The Parties agree that the provisions of this Section of this Article will be strictly adhered to and that they will provide mutual support for making corrections of violations that might occur.

23 FLRA No. 96

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, SOCIAL
SECURITY ADMINISTRATION
BALTIMORE, MARYLAND

Respondent

and Case No. 4-CA-40007

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Administrative Law Judge's Decision filed by the Department of Health and Human Services, Social Security Administration (the Respondent). The issue concerns whether the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to bargain with the American Federation of Government Employees, AFL-CIO (the Union) concerning a particular proposal. For the reasons stated below, we find no merit to this allegation.

II. Facts

On May 23, 1983, the Respondent and the Union, pursuant to an unfair labor practice settlement agreement, signed a Memorandum of Understanding (MOU) which provided, in part, that:

> This memorandum will serve as an agreement by Management and Local 2206 to enter into negotiations regarding Management's decision to rotate the Benefit Authorizer Technical Assistants on a 6-month basis. Negotiations will be in accordance with the [S]tatute and Article 4 of the National Agreement.

As a result of the MOU, the parties negotiated for over one month on 13 proposals submitted by the Union. Of the original proposals, the Union withdrew four because they infringed upon management's section 7106 rights; six were agreed to; and three, including the proposal involved in this case, Union Proposal No. 5, became subjects of unfair labor practice charges.[1/] The General Counsel concedes that while the Union's initial Proposal No. 5 concerning a system of errors to be applied uniformly to the Benefit Authorizer Technical Assistants (BATAs) may have infringed upon management's rights, it was offered as part and parcel of the posturing process during negotiations. Thereafter, during the month-long negotiations, the Union submitted several different versions of Proposal No. 5 concerning the same subject. The last offer was declared nonnegotiable by the Respondent.[2/]

III. Administrative Law Judge's Decision

The Judge found that the Respondent violated section 7116(a)(1) and (5) of the Statute by declaring Union Proposal No. 5 nonnegotiable. He found that by such action the Respondent repudiated the parties' MOU. In making this finding, the Judge noted that the Respondent had previously agreed to negotiate over the impact of a change in conditions of employment pursuant to the MOU executed as a part of the settlement agreement. Accordingly, the Judge found that the Respondent failed to meet its bargaining obligations by its declaration. He further concluded that the Respondent was obligated to negotiate with the Union over the proposal.

[1/] The record does not show what happened to the other two proposals subject to unfair labor practice charges.

[2/] The proposal at issue is:

> Technicians subject to quality assessment by the BATA will be given an appropriate list of errors by management, each defined in such a manner that all affected parties to this agreement have a common understanding of what they are and how they will be applied.
>
> Any error definition will be applied consistently to all affected employees throughout the SEPSC.

IV. Positions of the Parties

In its exceptions, the Respondent argues that it negotiated extensively and in good faith with the Union for one month. It contends that after a month of negotiations the parties reached an impasse. Further, it argues that the Judge's Decision finding the Union's proposal negotiable is erroneous because the proposal interferes with the Respondent's right to determine which duties and functions will be included in performance appraisals and thereby interferes with its right to assign work. Finally, it argues that the Judge's remedy ordering a national posting is excessive under the circumstances.

V. Analysis

In our view, the agency merely exercised its right under section 7117(c) of the Statute to allege that a proposal is nonnegotiable. The Authority has long held that an agency's declaration of nonnegotiability does not constitute bad faith bargaining where at the time of the declaration, no established precedent existed which was dispositive of the negotiability issue.[3] Since no established precedent exists with respect to the specific language of Proposal No. 5, Respondent's mere declaration of nonnegotiability does not constitute a violation of the Statute. In addition, where a unilateral change in conditions of employment coupled with a refusal to bargain is alleged, the Authority will make a negotiability ruling in the context of an unfair labor practice proceeding.[4] In this case, the complaint does not allege a unilateral change. We will not, therefore, decide the negotiability of Proposal No. 5 in this proceeding.

As for the Judge's reliance on the MOU, in our view it obligated the Respondent to negotiate over the rotation of the BATAs, not to negotiate on any and all proposals that the Union might make. The MOU provided: "Negotiations will be in accordance with the Statute." The Union acknowledges making certain proposals which might have infringed upon management's section 7106 rights, including earlier versions of Proposal No. 5. The Respondent had a statutory right to raise the same concern about the proposal at issue.

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[3] See 182nd Tactical Air Support Group, Illinois Air National Guard, The Adjutant General of Illinois, Springfield, Illinois, 10 FLRA 381 (1982).

[4] Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 22 FLRA No. 10 (1986).

We do not agree with the Judge's finding that the Respondent's nonnegotiability declaration with regard to one proposal was a repudiation of the MOU. The MOU constituted an agreement to negotiate, which the Respondent did for one month, agreeing to six of the Union's proposals.5/ There is no evidence that Respondent refused to negotiate in good faith.

Accordingly, we do not view the Respondent's conduct as violative of the Statute.

VI. Conclusion

Pursuant to section 2423 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision and the entire record, including the parties' contentions, and adopts the Judge's findings and conclusions only to the extent consistent with our decision. Therefore, we shall dismiss the complaint.

ORDER

The complaint in Case No. 4-CA-40007 is dismissed.

Issued, Washington, D.C. October 31, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

5/ Based on our decision in this case, we find it unnecessary to consider the Respondent's contentions that the parties were at a bargaining impasse.

(23 FLRA No. 96)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF THE ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY
ADMINISTRATION, BALTIMORE, MARYLAND

Respondent

and

Case No.: 4-CA-40007

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

Regina Kane, Esq.
For the General Counsel

L. J. Clary, Esq.
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein referred to as the Statute).

Upon unfair labor practice charges filed by the American Federation of Government Employees (herein referred to as the Union) on October 5, 1983 against the Department of Health and Human Services, Social Security Administration, Baltimore, Maryland (herein referred to as Respondent or SSA), the General Counsel of the Authority, by the Regional Director for Region 4, issued a Complaint and Notice of Hearing on February 15, 1984. The Complaint alleged that Respondent violated section 7116(a)(1) and (5) of the Statute by failing and refusing to bargain in good faith by declaring a union proposal non-negotiable and refusing to bargain in good faith concerning the policy described in the Union proposal.

Respondent's Answer denied the commission of any unfair labor practice.

A hearing was conducted in Birmingham, Alabama, at which time Respondent and the General Counsel were represented by Counsel and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Counsel for the General Counsel gave oral argument and Respondent filed a brief.

Upon the entire record in this matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

Findings of Fact

Since on or about June 11, 1982, the Respondent and Union have been parties to a collective bargaining agreement covering a nationwide consolidated unit which includes employees of Respondent at its Southeastern Program Service Center located in Birmingham, Alabama.

In October, 1982, Respondent implemented a change in policy concerning its Benefit Authorizer Technical Assistants (BATAs), who are responsible for reviewing the work of other employees, Benefit Authorizers (BAs). The BAs are responsible for post-adjudicative actions on Social Security cases. Prior to the above change implemented in October, 1982, a BATA was assigned on a permanent basis to one of thirty-six modules at Respondent's Southeastern Program Service Center. The module is a self-contained unit consisting of approximately fifty employees who collectively are responsible for processing and maintaining all Social Security claims and benefits. Each BATA is responsible for providing technical leadership, guidance and counsel to the ten to fifteen BAs assigned to each module, and for reviewing the work of the BAs, including the identification of "errors" made by the BAs.

Commencing with the change implemented in October, 1982 Respondent began rotation of BATAs from module to module every six months. The reason for the rotation was, as Respondent had perceived, that the BAs in each particular module had become familiar with their BATAs methods and preferences, and thus could predict what would or would not be an "error" to that specific BATA. Because Respondent unilaterally implemented this new rotation system without bargaining with the Union, the Union filed an unfair labor practice charge on October 15, 1982. The case, 4-CA-30042 was subsequently settled after issuance of a Complaint by the Regional Director, Region 4 and after Respondent entered into an agreement with the Union entitled Memorandum of Understanding, Ground Rules, on May 23, 1983. The signatories to this agreement were Respondent's Labor Relations Specialist George Sedberry and Local Union President Frank White. The Memorandum of Understanding provides, inter alia, that:

> This memorandum will serve as an agreement by Management and Local 2206 to enter into negotiations regarding

> Management's decision to rotate the Benefit Authorizer Technical Assistants on a 6-month basis. Negotiations will be in accordance with the [S]tatute and Article 4 of the National Agreement.
>
> This memorandum will serve as an agreement by Local 2206 to request withdrawal, concurrent with the initiation of negotiations, of the Unfair Labor Practice Charge filed on 10/15/82, Case No. 4-CA-30042, . . ."

Consistent with the above-stated objective of the Memorandum of Understanding and Ground Rules, Respondent and the Union, entered into negotiations on the impact and implementation of the rotation of BATAs in July, 1984. The principals for the negotiations were the agreements signatures White and Sedberry. The Union's intention apparently was to bargain over the adverse impact on the BAs and BATAs resulting from Respondent's decision to rotate BATAs. Consistent with this intention the Union identified areas it felt impacted on the employees involved.

According to Thomas M. Bruce, Director of Operations of the Program Service Center involved herein, all BATAs followed the same instructional guidance in reviewing BAs and there was unquestionably room for the BATAs to exercise judgment in the decision making process. Mr. Bruce further stated each BATAs definition of an "error" made by a BA was somewhat subjective and could differ from BATA and BATA. According to him a method existed for the resolution of an error because such differences of opinion indeed exist.

The Union was concerned that the implementation of the decision to rotate BATAs on a periodic basis would adversely impact BA's inasmuch as the BAs would no longer be familiar with the particular judgmental preferences of the BATAs assigned to them, especially with regard to what constituted an error. According to Mr. White, the rotation destroyed the advantage of knowing the preferences and actions of the BATA to which the BA was regularly assigned. The rotational process, particularly the assignment of errors, according to Mr. White, goes to the root of the evaluation process under the Civil Service Reform Act. Mr. White also vigorously denied that the Union desired during negotiations to participate in devising errors. In short, its appears that the Union was looking for consistency in definition of errors.

When the parties commenced negotiations pursuant to the May 23, 1983, Memorandum of Understanding, the Union initially submitted thirteen (13) proposals for management's consideration. Of the thirteen (13) original proposals the Union withdrew four (4) because they infringed upon management's section 7106 rights; six (6) were agreed to; and, three (3) which remained became subjects of unfair labor practice charges.

The proposal with which we are here concerned is item number five (5) of the thirteen (13) and concerns a system of errors to be applied uniformly to BATAs. While the Union's initial proposal on this matter admittedly infringed on management's rights under section 7106, the Union submitted several different proposals concerning the same subject during negotiations and it is its last offer which was declared non-negotiable on August 24, 1983, by Labor Relations Specialist Sedberry is at issue here. Mr. Sedberry, declared proposal item 5 non-negotiable "because there is no change in working conditions . . . no change in our personnel policy, practice, or working (sic), or conditions of employment."

In its last offer, the Union proposal on item 5 was as follows:

> Technicians subject to quality assessment by the BATA will be given an appropriate list of errors by management, each defined in such a manner that all affected parties to this agreement have a common understanding of what they are and how they will be applied.
>
> . . .
>
> Any error definition will be applied consistently to all affected employees throughout the SEPSC.

This proposal allegedly establishes a procedural requirement that after an error had been defined by management, the employee must be told what the definition is in a reasonably comprehensible manner in order to insure consistent application.

Mr. White testified, that when the Union submitted the above proposal, it desired Respondent to give the affected employees a list of what the errors were so that both BATAs and BAs possessed a mutual understanding of what constituted an error and so that the error definitions would be applied consistently to all employees throughout the Program Center.

Thereafter, a Mediator assisted the parties' at their request in August, however, actual negotiations on item 5 have not occurred at any time subsequent to August 24, 1983, when Respondent declared Item 5 non-negotiable.

On January 30, 1984, Mr. Bruce, issued a memorandum to all Program Center Operations Managers, entitled Exercise of Professional Judgment in Casework. The memorandum provided, as follows:

> Basically, this memorandum does not extend the authority technicians already possess since they already have the discretion to deviate from established procedures where individual case circumstances dictate a different course of action. The objective of the memorandum was to reinforce this authority and expectation and encourage the authorizers to fully exercise it . . . Some authorizers evidently feel a strong reluctance to deviate from procedures for fear of getting an error.

Discussion and Conclusions

The Authority has made it abundantly clear that where an agency in exercising a management right under section 7106 of the Statute, the statutory duty to negotiate comes into play if the change results in an impact upon unit employees or such impact was reasonably foreseeable. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 16 FLRA No. 32 (1984); U.S. Government Printing Office, 13 FLRA No. 39 (1983); Internal Revenue Service, Washington, D.C. and Fresno Service Center, Fresno, California, 16 FLRA No. 23 (1984); Department of Health and Human Services, Social Security Administration, 16 FLRA No. 103 (1984).

The Union's proffer of item 5 was prompted by its desire to have Respondent give affected employees a list of defined errors thereby insuring that both BATAs and BAs would know and have a common understanding of what constituted an "error". The impact in its view being that the individual BAs performance evaluation would ultimately be affected by the assignment of errors therefore, the Union desired advance knowledge of what constituted an error.

Respondent simply denies that the rotation of BATAs is a change in conditions of employment and sees no impact on BAs as a result of its rotating BATAs. The record is contrary to that assertion. The record disclosed more than a question of negotiability or impact and shows that Respondent had already agreed to negotiate the impact of the change in rotation of BATAs.[1] Case No. 4-CA-30042 was informally resolved on the basis that Respondent would negotiate concerning its decision to rotate BATAs and that such negotiations would be done in conformity with the Statute and Article 4 of the parties collective bargaining agreement. If Respondent did not view the rotation as a change in conditions of employment, why then did it agree to engage in negotiations concerning the rotation. That issue was resolved by its capitulation in entering into the settlement agreement in the initial case. I agree with the General Counsel that Respondent's position is dissembling. First, Respondent admits an obligation to bargain concerning the impact and implementation of a subject, enters into an agreement memorializing that position, an agreement by the way, which was made possible only by the Union's settlement of a charge found meritorious by the Regional Office, engages in negotiations concerning some previously contested items but decides that it does not want to honor the agreement where item 5 is concerned. Inasmuch as Respondent refused to negotiate concerning item 5 it is found the Respondent's action constitutes a repudiation of that agreement and violates section 7116(a)(1) and (5) of the Statute. See Great Lakes Program Service Center, Social Security Administration, Department of

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[1] Based on the May 23, 1983 Memorandum of Understanding, I find that Respondent's waiver argument lacks merit.

Health and Human Services, 9 FLRA 499 (1982); Veterans Administration Hospital, Danville, Illinois, 4 FLRA 432 (1980).

Respondent, asserts that it met its obligation to bargain in this matter since it met in a good-faith effort to reach agreement. It contends, that under Bureau of Prisons, Lewisburg Penitentiary, Lewisburg, Pennsylvania, 11 FLRA 639 (1983) the fact it was not persuaded to change its position during negotiations does not constitute a showing of bad faith.

The Lewisburg case is inapplicable since no Memorandum of Understanding was involved in that case. Here it is clearly established by Respondent's position in settling Case No. 4-CA-30042 that it would engage in impact and implementation bargaining and that at least implicitly, it had an obligation to engage in impact bargaining concerning the rotation of BATAs. Anything less than complete bargaining on the impact and implementation apparently would not be in accord with the agreement it entered into in May 1983. This is not a situation under section 7106 where Respondent elects to negotiate, since its election to negotiate was exercised when it entered the Memorandum of Understanding. In this same vein, Respondent engaged in negotiations over other aspects of the rotation of BATAs thereby buttressing the opinion that a change in conditions of employment had occurred. Finally, meeting but affirmatively refusing to negotiate does not satisfy the obligation to bargain as Respondent seems to suggest. Cf., Library of Congress, 9 FLRA 427 (1982).

In rejecting the May 1983 Memorandum of Understanding and assuming that it had no obligation to bargain consistent with that memorandum Respondent now maintains that no adverse impact occurred when it exercised management rights herein. I disagree. A foreseeable impact clearly exists since the record indicates errors are incorporated into the employees rating process. Clearly the Union saw potential adverse impact and presented its proposals pertinent to such impact.

The General Counsel argues that the proposal offered by the Union was negotiable and that this matter falls within the class of cases where agencies must bargain over the dissemination or communications of determinations to employees because such dissemination or communication in no way interferes with managements abilities to make the determinations, and as such are matters which are fully negotiable. Citing Department of the Army, Fort Monmouth, New Jersey, 13 FLRA 426 (1983); Bureau of Public Debt, 3 FLRA 768 (1980); Federal Deposit Insurance Corporation, Chicago Region, 7 FLRA 217 (1981); Office of Personnel Management, Washington, D.C., 3 FLRA 783 (1980); Department of the Treasury, U.S. Customs Service, 9 FLRA 983 (1982).

Turning to the General Counsel's argument that the record demonstrates that the Union's final proposal did not attempt to give it the right to determine what constitutes an error nor did it seek any input into that determination. The Union proposal here appeared to be no more than a procedural requirement seeking to establish that once an error has been defined by the agency, the employee would be told the definition of the error in a reasonably intelligible manner. The proposal certainly goes to the impact of Respondent's decision to rotate BATAs, particularly because the major concern of the Union here was to prevent the lack of uniformity of application of the system of errors. Thus, Respondent was obligated to bargain with the Union on this proposal unless the Union's proposal (if adopted) would substantially, or excessively, interfere with management's right to determine the errors. See U.S. Customs Service, Region II, 11 FLRA 209 (1983); Office of Personnel Management, Washington, D.C., 8 FLRA 460 (1982) (D.C. Cir. March 13, 1984), or unless a government-wide regulation or Statute left no discretion to the agency in the "choice" of the procedure. See U.S. Customs, Region II, 11 FLRA 209 (1983); Bureau of Alcohol, Tobacco, and Firearms, 8 FLRA 547 (1982); March AFB, Riverside, California, 13 FLRA No. 44, 13 FLRA 255 (1983).

A review of the Union's proposal indicates that it did not interfere with the Respondent's right to determine errors, and that the proposal concerning the definition of "errors" which would affect employee evaluations fell within the duty to bargain. Furthermore, Respondent raised no government-wide regulation with which the proposal is incompatible or irreconcilable. As the General Counsel notes, the Union's proposal, if accepted, does not require Respondent to adopt any input from the Union or employees on the definition of error. To the contrary, the proposal simply provides a means for the employee or Union to know what the errors are and how they are to be applied. Knowledge of what an error is and its application in a consistent manner indeed might reduce adverse impact of rotating BATAs, while leaving management's decision-making unaffected.

Accordingly, in view of the foregoing and the conclusion that Respondent has violated section 7116(a)(1) and (5) of the Statute, by declaring a union proposal non-negotiable and refusing to negotiate thereon although a reasonably foreseeable impact existed,[2] I recommend the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's regulations and section 7118 of the Statute, it is hereby ordered that the Social Security Administration, Baltimore, Maryland shall:

1. Cease and desist from:

(a) Failing or refusing to negotiate in good faith with the American Federation of Government Employees,

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[2] In light of the above findings, Respondent's Motion to Dismiss is denied.

AFL-CIO, the employees' exclusive collective bargaining representative by declaring to the following proposal concerning the rotation of BATAs non-negotiable:

> Technicians subject to quality assessment by the BATA will be given an appropriate list of errors by management, each defined in such a manner that all affected parties have a common understanding of what they are and how they will be applied. . . . Any error will be applied consistently to all affected employees.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request of the American Federation of Government Employees, AFL-CIO, the employees' exclusive collective bargaining representative, negotiate in good faith, to the extent consonant with law and regulations, concerning the impact and implementation of the proposal concerning the rotation of BATAs.

(b) Post at all of its facilities where employees represented by the American Federation of Government Employees, AFL-CIO, the employees' exclusive representative, are located, copies of the attached Notice marked "Appendix", on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by an appropriate official and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and all other places where notices to employees are customarily posted. The Commissioner shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Federal Labor Relations Authority's Rules and Regulations, notify the Regional Director of Region 4, Federal Labor Relations Authority, 1776 Peachtree Street, NW., Suite

501 - North Wing, Atlanta, GA 30309, in writing within 30 days from the date of the Order as to what steps have been taken to comply herewith.

Eli Nash, Jr.

ELI NASH, JR.
Administrative Law Judge

Dated: December 24, 1984
Washington, DC

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

We hereby notify our employees that:

WE WILL NOT fail and refuse to bargain in good faith with the American Federation of Government Employees, AFL-CIO by declaring the following proposal concerning the rotation of BATAs non-negotiable:

> Technicians subject to quality assessment by the BATA will be given an appropriate list of errors by management, each defined in such a manner that all affected parties to this Agreement have a common understanding of what they are and how they will be applied. Any error will be applied consistently to all affected employees throughout the SEPSC.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Statute.

WE WILL bargain collectively with the American Federation of Government Employees, AFL-CIO on all proposals concerning the implementation of the rotation of BATAs and the impact thereof upon employees adversely affected, including the proposal set forth above.

____
(Agency or Activity)

Dated: ________________ By: ____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region 4, whose address is: 1776 Peachtree Street, NW., Suite 501 - North Wing, Atlanta, GA 30309 and whose telephone number number is: (404) 881-2324.

23 FLRA No. 97

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES,
LOCAL R7-23

Union

and

Case No. 0-NG-1252

DEPARTMENT OF THE AIR FORCE
SCOTT AIR FORCE BASE, ILLINOIS

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents issues as to the negotiability of three Union proposals. We find that all three proposals are nonnegotiable.

II. Union Proposal 1

> Article 7, Section 2: When a change in duty hours, days, or weeks currently in effect is proposed by the employer, such change will be announced in writing to the union and the employees at least 14 days in advance, except in emergencies, in order that the union may request to enter into negotiations and so that employees will be forewarned of a pending change.

A. Positions of the Parties

The Agency contends that Union Proposal 1 is nonnegotiable under section 7117(a)(1) of the Statute because it is inconsistent with a Government-wide regulation, 5 C.F.R. § 610.121(b)(2). In support of its contention, the Agency cites the Authority's decision in American Federation of Government Employees, AFL-CIO, Local 2484 and U.S. Army Garrison, Fort Detrick, Maryland, 17 FLRA 769 (1985), petition for review filed sub nom. American Federation of Government Employees, Local 2484 v. Federal Labor Relations Authority, No. 85-1405 (D.C. Cir. July 3, 1985), and cases relying thereon.[1]

The Union acknowledges this Authority precedent but requests that the Authority not decide the issue until the U.S. Court of Appeals for the District of Columbia Circuit rules on the Authority's decision in the Fort Detrick case.

B. Analysis and Conclusion

The proposal requires the Agency to give employees and the Union 14 days notice before making any changes in established work schedules, except in emergency situations. Office of Personnel Management (OPM) regulations provide, as relevant here, that an agency must change an employee's work schedule when it knows in advance that the employee's schedule will be different from that which the employee is currently working; and must notify the employee of the change. 5 C.F.R. § 610.121(b)(2) (1986). As the Agency points out, in the Fort Detrick decision the Authority held that a proposal requiring two weeks notice, like the one in this case, was inconsistent with the OPM regulation because it would preclude the agency from complying with that regulation unless it became aware of the need to change work schedules not less than two weeks prior to the rescheduling. OPM supported the Authority's interpretation of 5 C.F.R. § 610.121(b)(2) in amicus briefs filed with the Authority in subsequent cases involving this issue. See, for example, National Federation of Federal Employees, Local 7 and U.S. Army Corps of Engineers, Portland District, 19 FLRA No. 18 (1985); American Federation of Government Employees, Local 1546 and Department of the Army, Sharpe Army Depot, Lathrop, California, 19 FLRA No. 118 (1985) (Provision 1), petition for review filed sub nom. American Federation of Government Employees, Local 1546 v. Federal Labor Relations Authority, No. 85-1689 (D.C. Cir. October 21, 1985). The American Federation of Government Employees, AFL-CIO, however, challenged the validity of 5 C.F.R. § 610.121(b) in a suit filed in the U.S. District Court for the District of Columbia. In its Memorandum and Order in that case, American Federation of Government Employees v. Office of Personnel Management, C.A. No. 85-4031 (D.D.C. August 7, 1986), slip opinion at 5, the court upheld the regulation stating that:

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[1] For the cases which relied on the Fort Detrick decision see the Appendix to this decision.

> [N]otwithstanding it may not say so in so many words, subsection (b) which permits workweeks to be rescheduled was intended, and is interpreted, by OPM to be qualified by subsection (a) directing agency heads to establish conventional workweek schedules except upon a determination that the agency would be seriously handicapped in carrying out its functions or that costs would be substantially increased.[2]

In light of the court's decision, we have reconsidered the basis of the Fort Detrick decision. For the reasons set forth below, we will no longer follow our rationale in Fort Detrick and the cases which applied it.

Applicable law, 5 U.S.C. § 6101(a)(3)(A), provides that an agency shall schedule employees' tours of duty not less than seven days in advance, except where it is determined that the agency would be seriously handicapped in carrying out its functions or that costs would be substantially increased.[3] As noted above, in the Fort Detrick decision, the Authority interpreted OPM regulations implementing that provision--in particular, 5 C.F.R. § 610.121(b)(2)--as requiring an agency to change employee work schedules as soon as it became aware that such a change would be necessary.[4] Upon further review, we conclude that this interpretation does not comport with the statutory requirement that work schedules may be revised less than seven days in advance only where it is necessary to prevent the agency from being handicapped in the execution of its functions or to forestall a substantial increase in operational costs. In other words, interpreting 5 C.F.R. § 610.121(b) consistent with 5 U.S.C. § 6101(a)(3)(A) and 5 C.F.R. § 610.121(a), employees must have a minimum of seven days advance notice of a change in work schedules unless the change is being made for the reasons set forth in the statute (and repeated in 5 C.F.R. § 610.121(a)).

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[2] For a more detailed statement of the Court's opinion, see the Appendix to this decision.

[3] For the text of 5 U.S.C. § 6101(a), see the Appendix to this decision.

[4] For the text of 5 C.F.R. § 610.121(a) and (b), see the Appendix to this decision.

The proposal at issue here, which would permit the Agency to change employee work schedules within the fourteen day notice period only in an emergency, is inconsistent with the statutory and regulatory provisions. We note at the outset that the proposal allows the Agency to change employee work schedules without notice in an "emergency," without defining that term, and thus is consistent with management's right to take action in an emergency under section 7106(a)(2)(D). Compare National Federation of Federal Employees, Local 2059 and U.S. Department of Justice, U.S. Attorney's Office, Southern District of New York, New York, New York, 22 FLRA No. 13 (1986) (proposal defining the term "emergency" directly interferes with management's right under section 7106(a)(2)(D) by limiting the exercise of that right to situations falling within the proposed definition). However, the exception to the notice period set forth in the proposal is too narrow. The terms defining the statutory (5 U.S.C. § 6101(a)(3)(A)) and regulatory (5 C.F.R. § 610.121(a)) exceptions are broader than the term "emergency" used in the proposal. Situations falling within the scope of the statute and regulations--circumstances which would seriously handicap an agency in accomplishing its functions or would substantially increase costs--would not necessarily constitute "emergencies" as defined by the Agency pursuant to its right under section 7106(a)(2)(D). The exception set forth in the proposal therefore would impermissibly restrict the Agency's right, under law and regulation, to revise employee work schedules. For that reason we find that the proposal is inconsistent with 5 U.S.C. § 6101(a)(3)(A) and 5 C.F.R. § 610.121(a) and (b) and, under section 7117 of the Statute, outside the duty to bargain.

Although we are no longer following the rationale of the Fort Detrick decision, the result in that case, or in cases which relied on Fort Detrick and involved similarly worded proposals or provisions, would not be different from the result here. Because the provision in Fort Detrick, like the proposal here, limited the agency's right to change employee work schedules to situations constituting an "emergency," it would also be inconsistent with law and regulation for the reasons stated above and outside the duty to bargain.

III. Union Proposal 2

> Article 14, Section 7: All areas serviced by the CCPO shall be in the same competitive area for reduction-in-force purposes.

A. Positions of the Parties

The Agency contends that this proposal is essentially the same as the proposed competitive area which the Authority found nonnegotiable in National Association of Government Employees, Local R7-23 and Department of the Air Force, Headquarters 375th Air Base Group (MAC), Scott Air Force Base, Illinois, 19 FLRA No. 63 (1985), remanded sub nom. National Association of Government Employees, Local R7-23 v. Federal Labor Relations Authority, No. 85-1522 (D.C. Cir. Dec. 3, 1985). The Agency also contends that the proposal is outside the duty to bargain under section 7117(a)(2) because it conflicts with an Agency regulation for which a compelling need exists and under section 7106(a)(2) because it violates management's rights.

The Union contends that the decision in the previous Scott Air Force Base case does not apply to this proposal because that case was remanded by the court for reconsideration in light of the court's decision in Local 32, American Federation of Government Employees v. Federal Labor Relations Authority, 774 F.2d 498 (D.C. Cir. 1985). The Union also contends that there is no compelling need for the regulation relied on by the Agency and that the proposal does not conflict with management's rights.

B. Analysis and Conclusion

We find that the proposal is outside the duty to bargain because it directly determines the conditions of employment of nonunit employees.

In our Decision and Order on Remand in the Scott Air Force Base case, 22 FLRA No. 79 (1986), we reaffirmed our previous holding that the proposed competitive area in that case was outside the duty to bargain because it would include nonunit employees. The proposal at issue in that case defined the competitive area in terms of all bargaining unit positions serviced by the Consolidated Civilian Personnel

Office (CCPO). As we pointed out in our Decision and Order on Remand, the CCPO services areas that are composed of bargaining unit and nonbargaining unit employees. There is no material difference between the proposal in that case and the proposal in this case. The result in this case, therefore, is the same: the proposed competitive area is outside the duty to bargain.

IV. Union Proposal 3

> Article 23, Section 30: The employer agrees that it will only collect for damages to government property in an amount equal to no more than 1 month's salary/wages and then only for cases where the bargaining unit employees have been ultimately found guilty of gross negligence.

A. Positions of the Parties

The Agency contends that Union Proposal 3 is outside the duty to bargain because it interferes with management's right to determine its internal security practices under section 7106(a)(1) of the Statute.

The Union acknowledges that the Authority has held similar proposals to be nonnegotiable under section 7106(a)(1), but argues that Union Proposal 3 constitutes an appropriate arrangement under section 7106(b)(3) for employees adversely affected by the exercise of management's right to determine its internal security practices.

B. Analysis and Conclusion

For the following reasons we find that Union Proposal 3 is nonnegotiable. As the Agency points out, in *National Federation of Federal Employees, Local 29 and Department of the Army, Kansas City District, U.S. Army Corps of Engineers, Kansas City, Missouri*, 21 FLRA No. 32 (1986), *petition for review filed sub nom. National Federation of Federal Employees, Local 29 v. Federal Labor Relations Authority*, No. 86-1308 (D.C. Cir. May 28, 1986) and *American Federation of Government Employees, AFL-CIO, Council 214 and Department of the Air Force, Headquarters Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 21 FLRA No. 34 (1986), *petition for review filed sub nom. American Federation of Government Employees, Council 214 v. Federal Labor Relations Authority*, No. 86-1340 (D.C. Cir. June 9, 1986), the Authority held, respectively, that a proposal establishing a maximum amount for employee pecuniary liability and a proposal establishing the standard by which employees would be adjudged to be pecuniarily liable directly interfered with management's right to determine its internal security practices under section 7106(a)(1). Union Proposal 3, therefore, which also provides for a cap on employee liability and a criterion by which to determine whether an employee is liable, likewise directly interferes with management's rights under section 7106(a)(1) and is outside the Agency's duty to bargain.

Moreover, even assuming that Union Proposal 3 constitutes an "arrangement" for employees adversely affected by management's right to determine its internal security practices, we conclude that it excessively interferes with that right so as to be an "inappropriate" arrangement under section 7106(b)(3) of the Statute. The proposal, among other things, would replace the standard of simple "negligence," promulgated by management under section 7106(a)(1), with the standard of "gross negligence", which had previously been the standard established by management. Management's change in this standard is more than a matter of words or a question of degree of emphasis. Management's change reflects a determination that a new, distinctly different substantive requirement should govern employee conduct on the job. In essence, therefore, the proposal would completely reverse the substantive effect of management's action in changing the standard. As the U.S. Court of Appeals for the District of Columbia Circuit stated in setting forth the "excessive interference" test for appropriate arrangements under section 7106(b)(3):

> Undoubtedly, some arrangements may be inappropriate because they impinge upon management prerogatives to an excessive degree. [Emphasis in original.] A provision, for example, that would require a demoted employee simply to be repromoted to his or her former job would be inappropriate (to the point of absurdity) for that reason. [Emphasis added.] Beyond that, we decline to speculate as to what the word "appropriate" may lawfully be interpreted to exclude. . . .

American Federation of Government Employees, Local 2782 v. Federal Labor Relations Authority, 702 F.2d 1183, 1188 (D.C. Cir. 1983). Insofar as the standard for liability is concerned, Union Proposal 3, like the court's example, completely negates management's exercise of its rights and is therefore excessive. Proposals which totally abrogate the exercise of a management right excessively interfere with that right and do not constitute "appropriate arrangements."

See *American Federation of Government Employees, AFL-CIO, Local 3186 and Department of Health and Human Services, Office of Social Security Field Operations, Philadelphia Region*, 23 FLRA No. 30 (1986) (Union Proposal 1); *Federal Union of Scientists and Engineers and Department of the Navy, Naval Underwater Systems Center*, 22 FLRA No. 83 (1986).

V. Order

Pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review of Union Proposals 1-3 be, and it hereby is, dismissed.

Issued, Washington, D.C. October 31, 1986.

J. L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

Appendix

1/ *American Federation of Government Employees, AFL-CIO, Local 900 and Department of the Army, Office of the Adjutant General, U.S. Army Reserve Components Personnel and Administrative Center, St. Louis, Missouri*, 18 FLRA No. 6 (1985), *petition for review filed sub nom. American Federation of Government Employees, Local 900 v. Federal Labor Relations Authority*, No. 85-1406 (D.C. Cir. July 3, 1985); *American Federation of Government Employees, National Council of Grain Inspection Locals and U.S. Department of Agriculture, Federal Grain Inspection Service*, 18 FLRA No. 70 (1985), *enforced sub nom. American Federation of Government Employees, National Council of Grain Inspection Locals v. Federal Labor Relations Authority*, 794 F.2d 1013 (5th Cir. 1986); *National Association of Government Employees, Local R7-36 and U.S. Department of the Army, Savanna Army Depot*, 18 FLRA No. 86 (1985); *National Federation of Federal Employees, Local 7 and U.S. Army Corps of Engineers, Portland District*, 19 FLRA No. 18 (1985); *National Federation of Federal Employees, Local 687 and Department of the Air Force, Headquarters 63rd Air Base Group (MAC), Norton Air Force Base, California*, 19 FLRA No. 78 (1985) (Union Proposals 1 and 2); *American Federation of Government Employees, Local 1546 and Department of the Army, Sharpe Army Depot, Lathrop, California*, 19 FLRA No. 118 (1985) (Union Provision 1), *petition for review filed sub nom. American Federation of Government Employees, AFL-CIO, Local 1546 v. Federal Labor Relations Authority*, No. 85-1689 (D.C. Cir. October 21, 1985); *National Association of Government Employees, Local R1-100H and Department of the Navy, Naval Hospital, Groton*, 20 FLRA No. 17 (1985); *American Federation of Government Employees, AFL-CIO, Local 1955 and The Adjutant General, Iowa, Departments of the Army and the Air Force, National Guard Bureau*, 20 FLRA No. 46 (1985); *American Federation of Government Employees, AFL-CIO, Local 1738 and Veterans Administration Medical Center, Salisbury, North Carolina*, 20 FLRA No. 47 (1985) *American Federation of Government Employees, AFL-CIO, Local 1909 and Department of Defense, Department of the Army, U.S. Army Training Center and Fort Jackson, South Carolina*, 20 FLRA No. 56 (1985); *American Federation of Government Employees, AFL-CIO, Local 2484 and Department of the Army, Fort Detrick, Maryland*, 20 FLRA No. 79 (1985); *Department of Defense, Department of the Army, Headquarters XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina and American Federation of Government Employees, Local 1770, AFL-CIO*, 20 FLRA No. 101 (1985); *National Association of Government Employees, Local R14-87 and Kansas Army National Guard*, 21 FLRA No. 4 (1986) (Provision 1); *American Federation of Government Employees,* AFL-CIO, Meat Grading Council of Locals and Department of Agriculture, Meat Grading and Certification Branch, 22 FLRA No. 52 (1986).

2/ The Court stated, at 5 of the slip opinion, as follows:

> OPM responds that the regulation, like the statute, permits a variable workweek only under exceptional circumstances; notwithstanding it may not say so in so many words, subsection (b) which permits workweeks to be rescheduled was intended, and is interpreted, by OPM to be qualified by subsection (a) directing agency heads to establish conventional workweek schedules except upon a determination that the agency would be seriously handicapped in carrying out its functions or that costs would be substantially increased. Moreover, the pertinent language of subsection (a) reiterates that of the statute pursuant to which the regulation was promulgated, and the statute qualifies the regulation by operation of law whether the regulation expressly says so or not. Therefore, when regulation and statute are read together, as they must be, it is clear that agency heads must reschedule their employees' workweeks as necessary to accomplish the agency's mission, but only after having first determined that the agency would be seriously handicapped or its costs substantially increased if original work schedules were retained. The Statute and regulation are consistent.

3/ 5 U.S.C. § 6101(a) provides, in relevant part, as follows:

> § 6101. Basic 40-hour workweek; work schedules; regulations
>
> (a)(1) For the purpose of this subsection, "employee" includes an employee of the government of the District of Columbia and an employee whose pay is fixed and adjusted from time to time under section 5343 or 5349 of this title, or by a wage board or similar administrative authority serving the same purpose, but does not include an employee or individual excluded from the definition of employee in section 5541(2) of this title, except as specifically provided under this paragraph.
>
> (2) The head of each Executive agency, military department, and of the government of the District of Columbia shall--

(A) establish a basic administrative workweek of 40 hours for each full-time employee in his organization; and

(B) require that the hours of work within that workweek be performed within a period of not more than 6 of any 7 consecutive days.

(3) Except when the head of an Executive agency, a military department, or of the government of the District of Columbia determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he shall provide, with respect to each employee in his organization, that--

(A) assignments to tours of duty are scheduled in advance over periods of not less than 1 week;

(B) the basic 40-hour workweek is scheduled on 5 days, Monday through Friday when possible, and the 2 days outside the basic workweek are consecutive;

(C) the working hours in each day in the basic workweek are the same;

(D) the basic non-overtime workday may not exceed 8 hours;

(E) the occurrence of holidays may not affect the designation of the basic workweek; and

(F) breaks in working hours of more than 1 hour may not be scheduled in a basic workday.

4/ 5 C.F.R. § 610.121(a) and (b) (1986) provides:

§ 610.121 Establishment of work schedules.

(a) Except when the head of an agency determines that the agency would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he or she shall provide that--

(1) Assignments to tours of duty are scheduled in advance of the administrative workweek over periods of not less 1 week;

(2) The basic 40-hour workweek is scheduled on 5 days, Monday through Friday when possible, and the 2 days outside the basic workweek are consecutive;

(3) The working hours in each day in the basic workweek are the same;

(4) The basic non-overtime workday may not exceed 8 hours;

(5) The occurrence of holidays may not affect the designation of the basic workweek; and

(6) Breaks in working hours of more than 1 hour may not be scheduled in a basic workday.

(b)(1) The head of an agency shall schedule the work of his or her employees to accomplish the mission of the agency. The head of an agency shall schedule an employee's regularly scheduled administrative workweek so that it corresponds with the employee's actual work requirements.

(2) When the head of an agency knows in advance of an administrative workweek that the specific days and/or hours of a day actually required of an employee in that administrative workweek will differ from those required in the current administrative workweek, he or she shall reschedule the employee's regularly scheduled administrative workweek to correspond with those specific days and hours. The head of the agency shall inform the employee of the change, or he or she shall record the change on the employee's time card or other agency document for recording work.

(3) If it is determined that the head of an agency should have scheduled a period of work as part of the employee's regularly scheduled administrative workweek and failed to do so in accordance with paragraphs (b)(1) and (2) of this section, the employee shall be entitled to the payment of premium pay for that period of work as regularly scheduled work under Subpart A of Part 550 of this chapter. In this regard, it must be determined that the head of the agency: (i) Had knowledge of the specific days and hours of the work requirement in advance of the administrative workweek, and (ii) had the opportunity to determine which employee had to be scheduled, or rescheduled, to meet the specific days and hours of that work requirement.

9/case/400

Federal Labor Relations Authority

Washington, D.C. 20424

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UNFAIR LABOR PRACTICE CASES

23 FLRA No. 99 (October 31, 1986)

832nd Combat Support Group, Luke Air Force Base, Arizona and American Federation of Government Employees, Local 1547, AFL-CIO, Case No. 8-CU-50011

23 FLRA No. 100 (October 31, 1986)

United States Department of the Treasury, Internal Revenue Service and Internal Revenue Service, Austin District, and Internal Revenue Service, Houston District and National Treasury Employees Union and National Treasury Employees Union Chapter 52 and National Treasury Employees Union, Chapter, Case Nos. 6-CA-20127 and 6-CA-20128

23 FLRA No. 101 (October 31, 1986)

Farmers Home Administration Finance Office, St. Louis, Missouri and American Federation of Government Employees, AFL-CIO, Local 3354, Case No. 7-CA-30560

NEGOTIABILITY CASE

23 FLRA No. 103 (October 31, 1986)

Federal Union of Scientists and Engineers, National Association of Government Employees, Local RI-144, Case No. 0-NG-1267

Y3.F 31/21-3:

ARBITRATION CASES

23 FLRA No. 98 (October 31, 1986)

General Services Administration Region 10 and American Federation of Government Employees, Council 236 (Lumbley, Arbitrator), Case No. O-AR-1051

23 FLRA No. 102 (October 31, 1986)

Department of Justice Bureau of Prisons and American Federation of Government Employees, Local 1741 (Brown, Arbitrator), Case No. O-AR-1236

*Case No. O-NG-1216 (Order Denying Motion for Reconsideration of 22 FLRA No. 106) (October 28, 1986)

Department of Health and Human Services, Office of the Secretary Office of the General Counsel Baltimore, Maryland

*Case No. 5-CA-20218 (Decision on Motion for Reconsideration of 18 FLRA No. 28) (October 31, 1986)

Department of the Army, U.S. Army Corps of Engineers Detroit District and American Federation of Government Employees, Local 2130, AFL-CIO

In the following arbitration cases, the Authority denied the exceptions because they failed to establish that the arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Statute.

October 30, 1986

O-AR-1235

October 31, 1986

O-AR-1205

*NOTE Bound volume page numbers will not be assigned to the decisions marked with an asterisk at this time.

Federal Labor Relations Authority

23 FLRA No. 98

GSA, Region 10 and AFGE, Council 236, Case No. 0-AR-1051 (Decided October 31, 1986)

SUBJECT MATTER INDEX ENTRIES | **STATUTE**

Arbitration
  Award Modified
    "Extraordinary Circumstances" [5 C.F.R. section 2429.17]
  Procedure
    "Extraordinary Circumstances" [5 C.F.R. section 2429.17]
      Incomplete Award in Authority's Records

DIGEST NOTES

The Authority amended a previous decision because of the existence of "extraordinary circumstances" within the meaning of section 2429.17 of the Authority's rules and regulations. In its previous decision the Authority construed the last sentence of page 12 of the arbitrator's opinion and award as being the entire award. However, according to the parties' motions, the award contained a page 13 which, for unknown reasons, was not contained in the record submitted to the Authority.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

READEX FICHE best copy available

Federal Labor Relations Authority

23 FLRA No. 99

832nd Combat Support Group, Luke Air Force Base, Ariz. and AFGE, Local 1547, Case No. 8-CU-50011 (Decided October 31, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Representation	7112(b)(3)

- Representation
  - Personnel Work in Other Than a Purely Clerical Capacity
    - Equal Employment Opportunity Volunteer Counselors
    - Considerations in Determining
      - Confidentiality of Work
      - Grade Controlling Nature of Work
      - Primary Employment Purpose
      - Supervision
      - Term of Appointment
      - Voluntary Nature of Work
  - Procedure
    - Compelling Reason for Review [5 C.F.R. section 2422.17(c)(1)]

DIGEST NOTES

Collateral duty EEO counselors, who are part-time volunteers that perform counseling duties on an "as needed" basis, do not perform personnel work in other than a purely clerical capacity within the meaning of section 7112(b)(3). The counselors do not serve for a fixed period of time, but may terminate their own assignment at any time by declining to serve further or the activity may terminated their assignment at any time without complying with adverse action regulations. The EEO volunteer counseling position is not the employee's primary employment function. Neither the appointment as a counselor nor the counseling duties are grade controlling. For their EEO duties, the counselors receive technical guidance and review from the Chief EEO Counselor, but continue to receive supervision and evaluation from their regular supervisors. The counselors only spend 10 or 20 percent of their official duty time performing these duties. Since, contrary to the activity, the counselors do not perform personnel work in other than a purely clerical capacity, they are appropriately included in the bargaining unit.

Federal Labor Relations Authority

23 FLRA No. 100

U.S. Dep't of the Treasury, IRS and IRS, Austin District, and IRS, Houston District and NTEU and NTEU, Chapter 52 and NTEU, Chapter 222, Case Nos. 6-CA-20127 and 6-CA-20128
(Decided October 31, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practices	7116(a)(1), (6) and (8)
Agency Violations	7118
Generally	7131(a)
Ministerial Acts of an Activity	
Where Higher Level of Agency is Named in Complaint	
Where Higher Level of Agency is Not Named in Complaint	
Interfere, Restrain, Coerce Employees	
Failure to Comply with a Lawful FSIP Order	
Otherwise Refuse to Comply with the Statute	
7131(a)	
Federal Service Impasses Panel	
Adopt Language in Parties' Agreement	
Travel and Per Diem Provision	
Enforcement of Panel Order	
Remedy	
Attorney Fees Denied	
Equal Access to Justice Act [5 U.S.C. section 504]	
Back Pay Act [5 U.S.C. section 5596]	
Make Whole Employee and Union for Travel and Per Diem	

DIGEST NOTES

The agency violated section 7116(a)(1) and (8) when it denied employees official time for travel in violation of section 7131(a). The employees participated in mid-term negotiations and traveled to the site of negotiations during their regular work hours when they would have otherwise been in a work or paid leave status. The parties' collective bargaining agreement had a provision requiring such payments. That provision was included in the parties' agreement as a result of a final order by the Federal Service Impasses Panel (FSIP) in settlement of an impasse.

The Authority has consistently held that an agency's refusal to implement a decision and order of the Federal Service Impasses Panel requiring the parties to adopt language in their collective bargaining agreement violates section 7116(a)(1) and (6) unless the Authority finds that the failure to comply with the Panel's Order was justified because the provisions are contrary to the Statute or other applicable law, rule or regulation. The agency's determination not to comply with the lawful order of the Panel constituted a failure or refusal to cooperate in impasse decisions. However, since the complaint failed to allege a violation of section 7116(a)(6) of the Statute for failure to cooperate in impasse procedures or decisions, the Authority is limited to finding the agency's conduct violated section 7116(a)(1) in that such conduct inherently interfered with the exercise by employees of their right under section 7102 to engage in collective bargaining through their chosen representatives, which right includes the utilization of the processes of the Federal Sevice Impasses Panel.

It does not effectuate the purposes and policies of the Statute to find an additional cumulative violation of the Statute against a subordinate level of management named in a complaint, where the subordinate agency level merely performed a ministerial act by complying with the directives of a higher agency level that resulted in the Statute violation. However, a different situation exists when the level of management responsible for the directive is not named in the complaint. In that case, where only the subordinate level of management is named in the complaint, it is appropriate and consistent with Congressional intent to find that the subordinate level violated the Statute even when it only ministerial carried out the instruction of higher agency management.

An award of attorney fees is not appropriate under either the Equal Access to Justice Act (EAJA) (5 U.S.C. section 504) or the Back Pay Act (5 U.S.C. section 5596) in the circumstances of this case. Authority regulations provide that awards under the EAJA are available only to a respondent, other than the United States, who prevails against the General Counsel in an unfair labor practice proceeding. Therefore, the union, as a charging party, is not entitled to an award of attorney fees under the EAJA.

Under the Back Pay Act, an award of attorney fees must be based upon a finding that an unjustified or unwarranted personnel action has been committed which has deprived an aggrieved employee of "pay, allowances, or differentials" the employee would have earned or received if that action had not occurred. While the refusal of the agency to comply with the lawful FSIP order may have constituted an unwarranted personnel action which resulted in the denial of travel and per diem expenses to certain employees, travel and per diem expenses are not "pay, allowances, or differentials" within the meaning of the Back Pay Act. Rather, the "pay, allowances, or differentials" encompassed by the Back Pay Act constitute normal legitimate employee benefits in the nature of employee compensation or emoluments which do not extend to reimbursement payments such as per diem.

employee of travel allowances or differentials' the employee would have earned or received if that action had not occurred. While the refusal of the agency to comply with the lawful FSIP order may have constituted an unwarranted personnel action which resulted in the denial of travel and per diem payments to certain employees, travel and per diem expenses are not "pay, allowances, or differentials" within the meaning of the Back Pay Act. Rather, the "pay, allowances, or differentials" encompassed by the Back Pay Act constitute normal, recurring employee benefits in the nature of employee compensation or emoluments which do not extend to reimbursement payments such as per diem.

Federal Labor Relations Authority

23 FLRA No. 101

FHA Finance Office, St. Louis, Mo. and AFGE, Local 3354, Case No. 7-CA-30560 (Decided October 31, 1986)

SUBJECT MATTER INDEX ENTRIES

	STATUTE
Unfair Labor Practices	
Agency Violations	7114(a)(1)
Refusal to Negotiate	7114(b)(4)
Provide Names and Addresses of	7116(a)(1), (5) and (8)
Employees	7118

Otherwise Refuse to Comply with the Statute 7114(b)(4)

Remedies
- Provide Names and Address of Bargaining Unit Members to Union

Information
- Necessity or Relevance
  - Alternates to Achieve Purpose of Requested Information
    - Mere Existence of Alternates Insufficient for Denial
  - Direct Mailing Significantly Different Than On-the-Job Contact
- Request for Information
  - Written Request Need Not Explain Reasons
- Privacy
  - Privacy Act [5 U.S.C. section 552a]
    - Exception [(b)(2)]: FOIA [5 U.S.C. sec. 552(b)(6)]
      - Names and Addresses
    - Exception [(b)(3)]: Routine Use Exception
      - Names and Addresses

Digest Notes

The names and home addresses of bargaining unit employees should be provided the exclusive representatives upon its written request, the Authority held in reversing a prior decision. There are two exceptions to the Privacy Act's (5 U.S.C. section 552a) bar to disclosure applicable in the case: exception (b)(2) concerning the Freedom of Information Act and exception (b)(3) relating to "routine use" of information.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

In balancing the employees' privacy interest against the public interest in disclosure, the Authority found that the balance favors disclosure of the names and addresses sought by the union. The privacy interest of the average employee in his address is not particularly compelling. For example, although some employees do not favor the release of their names and home addresses, many of these employees already receive and often discard unsolicited mail. Also a union already has access to information such as salary levels that is more likely to implicate privacy concerns than the information sought. Therefore, the disclosure of the requested information would not constitute a clearly unwarranted invasion of personal privacy and does not fall within the (b)(6) exemption of the Freedom of Information Act (5 U.S.C. section 552).

Exception (b)(3) of the Privacy Act permits disclosure of information for a "routine use". Section (a)(7) of the Privacy Act defines routine use as "the use of such record for a purpose which is compatible with the purpose for which it is collected." The Office of Personnel Management (OPM) published notices defining the routine uses of personnel records of Federal employees. One notice defines a routine use as the disclosure of information to "officials of labor organizations recognized under 5 U.S.C. Chapter 71 when relevant and necessary to their duties of exclusive representation[.]" This standard is effectively the same as section 7114(b)(4)'s limitation of an agency's obligation to provide information. Accordingly, the Authority concluded that disclosure of the names and home addresses of bargaining unit employees falls within the "routine use" exception of the Privacy Act.

A union's written request for names and home addresses need not contain an explanation of the reasons for the request. A union's statutory obligations involve a broad range of representational activities. Section 7114(a)(1) of the Statute provides that an exclusive representative is responsible for representing the "interest of all employees in the unit it represents without discrimination and without regard to labor organization membership." A union must be able to communicate with those bargaining unit members if it is to adequately represent them. Names and home addresses are essential to direct mail communications. Alternate means of communication, such as desk drops, direct distribution at the work place, meetings, bulletin boards, and direct personal contacts, do not always provide adequate means of communications with bargaining unit employees.

Direct mailing to employees, which the disclosure of names and addresses facilitates, is an effective and efficient means of communication in many instances. Direct mail as a means of communication is fundamentally different from other alternatives which are controlled in whole or in part by the agency. When using direct mailings, the content, timing, and frequency of communication, is completely within the discretion of the union and there is no possibility of agency interference in the distribution of the message. Further, direct mailings reach unit employees in circumstances where those employees may consider the union's communication without regard to the time constraints inherent in their work environments, and in which any restraint the employe may feel as a result of the presence of agency management in the workplace is not present.

Disclosure of names and home addresses need not be made in situations where, for example, the evidence discloses that a union has acted in a manner which leads to the conclusion that the employees whose addresses would be disclosed would be in imminent danger if the union knew where they lived.

[illegible] Information Act (5 U.S.C. [illegible]

[illegible] The Office of Personnel Management [illegible] defining the routine uses of personnel records of federal employees. One notice defines a routine use as the disclosure of information to officials of labor organizations recognized under 5 U.S.C. Chapter 71 when relevant and necessary to their duties of exclusive representation.[17] This statement is effectively the same as Section 7114(b)(4)'s limitation of an agency's obligation to provide information. Accordingly, the Authority concluded that disclosure of the names and home addresses of bargaining unit employees falls within the "routine use" exception of the Privacy Act.

A union's written request for names and home addresses need not contain an explanation of the reasons for the request. A union's statutory obligations involve a broad range of representational activities. Section 7114(a)(1) of the Statute provides that an exclusive representative is responsible for representing the "interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." A union must be able to communicate with those bargaining unit members it is to adequately represent them. Names and home addresses are essential to direct mail communications. Alternate means of communication, such as hand outs, direct distribution at the work place, meetings, bulletin boards, and direct personal contacts, do not always provide adequate means of communication with bargaining unit employees.

Federal Labor Relations Authority

23 FLRA No. 102

Dep't of Justice, Bureau of Prisons and AFGE, Local 1741 (Brown, Arbitrator), Case No. 0-AR-1236 (Decided October 31, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Arbitration	7121(f)
Procedure	7122(a)
Forums	

Arbitrability of Matters Covered under 5 U.S.C. sec. 7512
Review of Matters Covered Under 5 U.S.C. sec. 7512

DIGEST NOTES

Exceptions to an arbitration award relating to the removal of a grievant may not be filed with the Authority under section 7122(a). Exceptions to arbitration awards relating to adverse actions under 5 U.S.C. section 7512, including removals, are precluded by section 7121(f) of the Statute from review by the Authority. Review of arbitration awards relating to matters described in section 7121(f) must be obtained in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board.

Determination of the procedural arbitrability by arbitrators in grievances concerning adverse actions under 5 U.S.C. section 7512 may be reviewed by the U.S. Circuit Court of Appeals for the Federal Circuit.

Federal Labor Relations Authority

23 FLRA No. 103

Federal Union of Scientists and Engineers, NAGE, Local R1-144 and U.S. Dep't of the Navy, Naval Underwater Systems Center, Case No. 0-NG-1267
(Decided October 31, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Negotiability	7105(a)(2)(E)
Government-Wide Rule or Regulation	7106(a)(2)(A)

Negotiability
  Government-Wide Rule or Regulation
    Found to be Government-Wide
      5 C.F.R. sections 351.501 - 351.506 (1986)
  Management Rights
    Remove Employees
      Super Seniority for Union Officials in RIFs
  Reduction-in-Force
    Government-Wide Rule or Regulation
      5 C.F.R. sections 351.501 - 351.506 (1986)
    Preferential Treatment for Union Officials
      Super Seniority
5 C.F.R. Part 351
FPM Letter 351-20, subchapter 3

DIGEST NOTES

A proposal is nonnegotiable that would require, in a RIF, the agency consider union officials and stewards to be senior to all other employees who are in the same competitive level and have the same tenure status. The proposal would violate the agency's right to remove employees under section 7106(a)(2)(A) by compelling first removal of employees who were not union officials and stewards. Also the proposal is contrary to OPM RIF regulations [5 C.F.R. sections 351.501 - 351.506 (1986)], which have been found to be Government-wide regulations. Under those regulations, an employee's retention standing is determined by the combination of tenure group, subgroup (veterans preference status), length of service and annual performance ratings. Because the proposal would award greatest seniority within a tenure group to union officials and stewards, based on their union office, it is inconsistent with these regulations.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal
Labor Relations
Authority

23 FLRA No. 103

Federal Union of Scientists
and Engineers, NAGE, Local
R1-144 and U.S. Dep't of the
Navy, Naval Underwater Systems
Center. Case No. 0-NG-1287
(Decided October 31, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Negotiability	
Government-Wide Rule or Regulation	7105(a)(2)(E) 7106(a)(2)(A)
Found to be Government-Wide	
5 C.F.R. sections 351.501 - 351.506 (1986)	
Management Rights	
Remove Employees	
Super Seniority for Union Officials in RIFs	
Reduction-in-Force	
Government-Wide Rule or Regulation	
5 C.F.R. sections 351.501 - 351.506 (1986)	
Preferential Treatment for Union Officials	
Super Seniority	
5 C.F.R. Part 351	
FPM Letter 351-20, subchapter 5	

DIGEST NOTES

A proposal is nonnegotiable that would require, in a RIF, the agency consider union officials and stewards to be senior to all other employees who are in the same competitive level and have the same tenure status. The proposal would violate the agency's right to remove employees under section 7106(a)(2)(A) by compelling first removal of employees who were not union officials and stewards. Also the proposal is contrary to OPM RIF regulations [5 C.F.R. sections 351.501 - 351.506 (1986)], which have been found to be Government-wide regulations. Under those regulations, an employee's retention standing is determined by the combination of tenure group, subgroup (veterans preference status), length of service and annual performance ratings. Because the proposal would award greatest seniority within a tenure group to union officials and stewards, based on their union office, it is inconsistent with these regulations.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

GENERAL SERVICES ADMINISTRATION
REGION 10

Activity

and

Case No. 0-AR-1051
(22 FLRA NO. 8)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 236

Union

ORDER AMENDING DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on a motion filed by the Agency requesting the Authority to amend and clarify its decision in 22 FLRA No. 8. The Union filed a response to the Agency's motion and filed a cross motion also seeking clarification of the Authority's decision.

II. BACKGROUND

In its decision the Authority modified the Arbitrator's award that the grievant be given a rating of "outstanding" by directing that the following language be substituted for that in the award:

> Management shall reevaluate in accordance with the general performance appraisal system and Article 19 of the parties' National Agreement the grievant's performance for the period stipulated to and designated by the parties and shall apply that rating to the appraisal periods in question.

In its decision the Authority construed the last sentence of page 12 of the Arbitrator's opinion and award as being the entire award. That sentence reads: "Accordingly, I shall order the Grievant be given a rating of outstanding for the two appraisal periods in question." Page 12 was the final page of the award in the record before the Authority. However, according to the parties' motions, the award contained a page 13 which reads as follows:

> ## AWARD
>
> I. It is the Award of your Arbitrator that Grievant Margaret Lien performed in an outstanding fashion during the appraisal periods June 1983 through May 1984 and June 1, 1984, through May 31, 1985.
>
> II. Accordingly, it is hereby Ordered that she be given an overall rating of outstanding with respect to her performance in both periods.

For reasons unknown, page 13 of the award was not contained in the record submitted to the Authority.

III. ANALYSIS AND CONCLUSION

Section 2429.17 of the Authority's Rules and Regulations provides in pertinent part:

> 2429.17 Reconsideration.
>
> After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. The motion shall be filed within 10 days after service of the Authority's decision or order. . . .

We find that in the situation described in the parties' motions, an extraordinary circumstance exists within the meaning of section 2429.17 of the Authority's Rules and Regulations. Therefore, the Authority has reconsidered its decision in 22 FLRA No. 8 in light of page 13 of the award. Upon review of page 13 of the award, the parties' motions, and our original decision, we conclude that our decision must be amended as set forth below.

IV. Decision

The Authority modifies its decision in 22 FLRA No. 8, June 6, 1986, by ordering that paragraphs I and II found on page 13 of the Arbitrator's award be struck and replaced by the substitute language ordered in the Authority's original decision.

Issued, Washington, D.C. October 31, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

23 FLRA No. 99

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

832nd COMBAT SUPPORT GROUP
LUKE AIR FORCE BASE, ARIZONA

Activity

and

Case No. 8-CU-50011

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1547, AFL-CIO

Petitioner

DECISION AND ORDER

I. Statement of the Case

This case is before the Authority as a result of our order granting the application for review of the Regional Director's Decision and Order on Petition for Clarification of Unit filed by the 832nd Combat Support Group, Luke Air Force Base, Arizona (Activity). In his Decision, the Regional Director found that four employees who serve as "collateral duty EEO counselors" should not be excluded from the bargaining unit pursuant to section 7112(b)(3) of the Statute.[1]

The Authority granted the application for review on the basis that it appeared that a compelling reason existed pursuant to the provisions of section 2422.17(c)(1) of the Authority's Rules and Regulations.[2] The parties were given an opportunity to file briefs with the Authority; neither party did so. Based on our decision below, we order those employees serving as "collateral duty EEO counselors" to be included in the bargaining unit.

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[1] Section 7112(b)(3) of the Statute provides that an appropriate unit may not include "an employee engaged in personnel work in other than a purely clerical capacity[.]"

[2] Section 2422.17(c)(1) provides that an application for review may be granted on the basis that "a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, Authority precedent[.]"

II. Background

The Equal Employment Opportunity (EEO) program function at Luke Air Force Base operates pursuant to Air Force Regulation 40-1613 and is organizationally located within the Activity's civilian personnel office. It is headed by a Chief EEO Counselor, a full-time staff position. The Chief EEO Counselor's function is to manage the EEO program, coordinating both counseling and complaint case processing activities. To administer the pre-complaint or counseling phase of the program, the Activity utilizes four EEO counselors who are referred to as "collateral duty EEO counselors" inasmuch as they perform their counseling duties on an "as needed" basis, in addition to their regular or primary duty assignments.

The candidates for "collateral duty EEO counselor" are interviewed by the Chief EEO Counselor who recommends those to be considered for selection by the Activity's Commander. The "collateral duty EEO counselor" does not serve for a fixed period of time, but may be terminated at any time by the Activity without complying with adverse action regulations. The "collateral duty EEO counselor" also may choose to terminate his or her own assignment at any time by declining to serve further. EEO counseling is not the employee's primary employment function. Neither the appointment as a counselor nor the counseling duties are grade controlling. For their EEO duties, the "collateral duty EEO counselors" receive technical guidance and review from the Chief EEO Counselor, but continue to receive supervision and evaluation from their regular supervisors. The "collateral duty EEO counselors" are selected from a broad cross-section of the Activity's components so as to be accessible to and better serve all employees.

The primary function of these counselors is to counsel employees in the pre-complaint stage. In fulfilling this function the counselors develop factual information through discussions with supervisors, management officials and other employees; conduct research into confidential personnel records where necessary; attempt informal resolution of complaints by providing advice and counsel to complainants and management officials; provide final narrative reports of counseling to the Chief EEO Counselor; and assist the complainant in preparing and filing formal EEO complaints on an "as needed" basis. The sensitive nature of the subject matter requires these "collateral duty EEO counselors" to maintain a strictly neutral posture. They are responsible for safeguarding the rights and confidentiality of both the complainant and the alleged discriminating official. As the "collateral duty EEO counselors" perform duties that are considered to be a bridge between management and the employees, they are neither aligned with or perceived to be aligned with management or the employees, but rather are identified with the goals and purposes of the EEO program.

The record further reveals that by specific addendum to their individual job descriptions, two of the incumbents are limited to spending no more than 20 percent of their duty time and the other two incumbents are limited to spending no more than 10 percent of their duty time performing EEO counseling functions.

III. Regional Director's Determination

The Regional Director concluded in his Decision and Order on Petition for Clarification of Unit that the four employees who serve as "collateral duty EEO counselors" should not be excluded from the bargaining unit pursuant to section 7112(b)(3) of the Statute. The Regional Director found, pursuant to the Authority's Decision in Department of the Air Force, Headquarters, San Antonio Air Logistics Center, Kelly Air Force Base, Texas, 3 FLRA 209 (1980), that the duties performed by the "collateral duty EEO counselors" fell within the scope of personnel work in other than a purely clerical capacity. He also found that as the "collateral duty EEO counselors" only spend 10 or 20 percent of their official duty time performing these duties, the character and extent of involvement in personnel matters was not such that it warranted their exclusion from the bargaining unit. Therefore, he ordered that the unit description be clarified to include the four named "collateral duty EEO counselors."

IV. Positions of the Parties

In its application for review, the Activity agrees with the Regional Director's finding that the "collateral duty EEO counselors" are performing duties which constitute personnel work in other than a purely clerical capacity within the meaning of section 7112(b)(3) of the Statute. The Activity contends that the purpose of section 7112(b)(3), as stated by the Authority in Office of Personnel Management, 5 FLRA 238 (1981), is to preclude the conflict of interest that would arise between the performance of Federal personnel work and union representation. The Activity argues that because the "collateral duty EEO counselors" are appointed by the Activity's Commander and are in effect his eyes and ears, have access to confidential files and records, and interview supervisors and management officials, a conflict of interest exists between their EEO duties and their union representation. Consequently, the Activity argues that the Regional Director erred when he considered the percentage of work time spent by the "collateral duty EEO counselors," and contends that the asserted conflict of interest created by their involvement in EEO counseling for 10 or 20 percent of their work time in this case is no less significant than the conflict created by the use of 100 percent of work time by the Equal Opportunity Specialists at issue in Kelly Air Force Base.

V. Analysis

The Authority agrees with the conclusions of the Regional Director that the "collateral duty EEO counselors" should be included in the bargaining unit. We disagree, however, with the Regional Director's finding that the counselors are engaged in Federal personnel work in other than a purely clerical capacity within the meaning of section 7112(b)(3) of the Statute.

The Authority has held that an employee is engaged in personnel work in other than a purely clerical capacity within the meaning of section 7112(b)(3) of the Statute if the employee is directly involved in performing personnel work that may affect employees in the unit and making recommendations to management concerning such personnel actions. Employees found to have been engaged in personnel work have been involved in work directly relating to the personnel operations of the employee's agency which would create a conflict of interest between the employee's job and union representation if the employee were included in the bargaining unit. See Social Security Administration, 17 FLRA 239 (1985); Environmental Protection Agency, Region VII, Kansas City, Missouri, 14 FLRA 25 (1984); Veterans Administration, Washington, D.C., 11 FLRA 176 (1983); and Department of Health and Human Services, Region X, Seattle, Washington, 9 FLRA 518 (1982). This is not the case here.

As noted by the Regional Director, the Authority in Kelly Air Force Base, upheld the Judge's findings that the employees in the job classification Equal Opportunity Specialist, GS-160-07, 09 and 11 should be excluded from the bargaining unit as they were engaged in personnel work in other than a purely clerical capacity. In so finding, the Judge noted that these employees who functioned as EEO counselors on a full-time basis were assigned to and worked out of the Activity's personnel office. Further, he found that in the course of their EEO counseling duties, they were privy to confidential personnel files and other confidential information.

The Authority finds in the circumstances of this case that the "collateral duty EEO counselors" are not engaged in Federal personnel work within the meaning of section 7112(b)(3) of the Statute. The very nature of the position of the "collateral duty EEO counselors" clearly distinguishes these employees from the full-time EEO counselors found in Kelly Air Force Base. Thus, the record indicates that the "collateral duty EEO counselors" are selected by the Activity's Commander for a term of unspecified duration and can be removed at any time without complying with adverse action regulations, or on their own volition can terminate their assignments. Although EEO duties and responsibilities are described in their official position descriptions, the duties do not constitute their primary employment purpose and neither the assignment as a counselor nor the counselling duties are grade controlling. The "collateral duty EEO counselors" are not assigned to the Activity's personnel office and receive only technical guidance and review from the Chief EEO Counselor. During the course of their EEO appointments, the "collateral duty EEO counselors" continue to be supervised by their individual supervisors who maintain organizational and operational control over them at all times. The "collateral duty EEO counselors" are considered neutral and a bridge between management and the employees; they are not viewed as being aligned with either group. In summary, based upon the fact that such assignments and duties do not constitute the employees primary employment purpose, are not grade controlling, are of a voluntary nature for a indefinite duration, and that the employees involved are neither attached to nor supervised by the personnel office and thus perceived to be neutral, the Authority finds that the "collateral duty EEO counselors" are not engaged in Federal personnel work within the meaning of section 7112(b)(3) of the Statute.

VI. Conclusion

The Authority concludes that section 7112(b)(3) of the Statute is not applicable to the four "collateral duty EEO counselors" and that these employees should be included in the collective bargaining unit.

ORDER

IT IS ORDERED that the unit sought to be clarified is clarified by including in the unit the following named "collateral duty EEO counselors": Geraldine Bly, Contract Administrator, GS-1102-09; James Mills, Heavy Mobile Equipment Mechanic, WG-5803-10; Paul King, Model Maker, WG-4714-13 and William Finley, Warehouse Worker, WG-6907-05.

Issued, Washington, D.C., October 31, 1986

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

23 FLRA No. 100

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF THE
TREASURY, INTERNAL REVENUE SERVICE
AND INTERNAL REVENUE SERVICE, AUSTIN
DISTRICT, AND INTERNAL REVENUE SERVICE
HOUSTON DISTRICT

Respondents

and

Case Nos. 6-CA-20127
6-CA-20128

NATIONAL TREASURY EMPLOYEES UNION
AND NATIONAL TREASURY EMPLOYEES UNION
CHAPTER 52 AND NATIONAL TREASURY
EMPLOYEES UNION, CHAPTER 222

Charging Party

DECISION AND ORDER

I. Statement of the Case

This consolidated unfair labor practice case is before the Authority as a result of the Regional Director's transfer of the stipulated record directly to the Authority for decision pursuant to section 2429.1(a) of the Authority's Rules and Regulations. The consolidated complaint alleges that the Department of the Treasury, Internal Revenue Service (IRS), the IRS Austin District and the IRS Houston District, referred to jointly as Respondents, violated section 7116(a) (1) and (8) of the Statute by their refusal to pay travel and per diem expenses and allow official time for travel to two employees representing the employees' exclusive representative in negotiations as required by section 7131(a) of the Statute.

II. Facts

On November 23 and 24, 1981, representatives of the Respondents and the National Treasury Employees Union (the Union), engaged in negotiations concerning procedures and appropriate arrangements for unit employees adversely affected by a reorganization of Respondents' facilities which resulted in the formation of Respondents' Houston District. These negotiations took place in Austin, Texas. Two employee representatives of the Union traveled to Austin, Texas from Houston and San Antonio, Texas. Respondents rejected the employees' requests for reimbursement of travel and per diem expenses and refused to grant official time for travel to and from the negotiations. Respondents did authorize official time for time actually spent by the employees in negotiations.

Prior to the negotiations referred to above, IRS and the Union had engaged in negotiations for a new national agreement. During these negotiations, the Union introduced certain proposals dealing with official time and the payment of union representatives' travel and per diem expenses. These proposals resulted in an impasse which was submitted to the Federal Service Impasses Panel (the Panel) for resolution. The Panel subsequently issued an order directing the inclusion of the Union's proposals in the parties' agreement. The IRS subsequently declared these proposals to be nonnegotiable and thereafter did not comply with the Panel's Order. The IRS' failure to comply with the Decision and Order of the Panel was the subject of a separate unfair labor practice charge. See Department of the Treasury and Internal Revenue Service, 22 FLRA No. 89 (1986).

The Authority specifically notes that there are no facts in the stipulated record of this case which explain the background or the reasons for IRS' determination that the Union's proposals are nonnegotiable or its subsequent decision not to comply with the Panel's Order. Thus the Authority will take administrative notice that in Department of the Treasury and Internal Revenue Service cited above, the Authority found that Respondent Treasury violated section 7116(a)(1) and (6) of the Statute when it disapproved contract language directed by the Panel's Order and directed Respondent IRS not to incorporate such language in its collective bargaining agreement.

The provisions which the Panel directed the parties to include in their national agreement provide as follows:

> Section 3 - Mid-Term Negotiations
>
> . . . .
>
> C. If the parties enter into mid-contract negotiations during the life of this agreement, the following ground rules will apply:

1. For nationally implemented changes referred to in Section 2A above:

. . . . . .

c. a number of bargaining unit employees equal to the number of management's representatives shall be given administrative time and paid travel and per diem to attend all mid-term bargaining sessions; provided, however, the union shall be allowed no more than four bargaining unit employees.

. . . . . .

2. For locally negotiated changes referred to in Section 4B1 above:

. . . . . .

b. a number of bargaining unit employees equal to the number of management's representatives shall be given administrative time and paid travel and per diem to attend all mid-term bargaining sessions; provided, however, the union shall be allowed no more than four bargaining unit employees.

. . . . . .

In the matter of Department of the Treasury, Internal Revenue Service, Washington, D.C. and National Treasury Employees Union, Case No. 80 FSIP 68 (1980).[1]

III. Positions of the Parties

A. The Respondents

The Respondents contend that they have not violated section 7116(a)(1) and (8) of the Statute as alleged in the complaint for the following reasons: (1) The Authority's Interpretation and Guidance in 2 FLRA 265 (1979), on which the complaint is based, is without support either in the wording of the Statute or its legislative history; (2) The

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[1] The Authority has taken administrative notice of the Decision and Order of the Panel cited above since the parties' stipulation failed to incorporate the language of the Panel's Order.

Respondents are without authority to expend appropriated funds for the payment of employee representatives' travel and per diem expenses; (3) Official time, as defined in section 7131(a) of the Statute, does not cover travel to and from bargaining sessions; and (4) Official time does not include travel and per diem expenses at local negotiations. Respondents' brief was filed prior to the Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1983), which rejected the Authority's interpretation of the Statute in its Interpretation and Guidance, 2 FLRA 265.

B. The General Counsel

The General Counsel contends that Respondents violated section 7116(a)(1) and (8) of the Statute when they refused to pay travel and per diem expenses and allow official time for travel to employees representing the Union in negotiations as provided for in section 7131(a) of the Statute. Essentially the General Counsel argues that the Authority's Interpretation and Guidance in 2 FLRA 265 is applicable to the facts presented in this case.[2/]

C. The Charging Party

The Charging Party also contends that the Respondents violated section 7131(a) in refusing to provide official time for travel, and in denying travel and per diem expenses, for union representatives engaged in mid-term negotiations. The Charging Party, as part of the remedy, requests that it be awarded attorney fees under the Equal Access to Justice Act, 5 U.S.C. § 504, and the Back Pay Act, 5 U.S.C. § 5596, and that the two employees who were denied official time for travel and travel and per diem expenses be made whole and otherwise fully reimbursed for the denial of such expenses.

IV. Analysis

A. Issues Connected with the Internal Revenue Service's Disapproval of the Panel-Directed Contract Language

The Authority has consistently held that an agency's refusal to implement a Decision and Order of the Federal Service Impasses Panel requiring the parties to adopt

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[2/] As was true of Respondents, the General Counsel's brief was submitted before the Authority's interpretation of the Statute was rejected by the Supreme Court in Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1983).

language in their collective bargaining agreement violates section 7116(a)(1) and (6) of the Statute unless the Authority finds that the failure to comply with the Panel's Order was justified because the provisions are contrary to the Statute or other applicable law, rule or regulation. Department of Defense, National Guard Bureau, Indiana Air National Guard, Indianapolis, Indiana, 17 FLRA 23 (1985) and National Aeronautics and Space Administration, Headquarters, Washington, D.C., 12 FLRA 480 (1983). In its decision in Interpretation and Guidance, 15 FLRA 564 (1984), aff'd. sub nom. American Federation of Government Employees, AFL-CIO v. FLRA, 778 F.2d 850 (D.C. Cir. 1985), the Authority determined that the unfair labor practice mechanism is available for the purpose of obtaining review of an agency head's action in refusing to approve a provision of a collective bargaining agreement imposed on the parties by a final order of the Panel in resolving an impasse. When this occurs, the head of the agency acts at risk and a union challenging the agency head's disapproval may file a charge alleging that such conduct violated the Statute.

Since the provisions imposed by the Panel in this case are not materially different from the proposal recently found to be negotiable by the Authority in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986), petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1198 (D.C. Cir. March 27, 1986), the determination by the IRS not to comply with the lawful order of the Panel constituted a failure or refusal to cooperate in impasse decisions. Since the complaint fails to allege a violation of section 7116(a)(6) of the Statute for failure to cooperate in impasse procedures or decisions, the Authority is limited to finding that conduct of Respondent IRS violated section 7116(a)(1) of the Statute in that such conduct inherently interfered with the exercise by employees of their right under section 7102 of the Statute to engage in collective bargaining through their chosen representatives, which right includes the utilization of the processes of the Federal Service Impasses Panel. It is well established that the impasse resolution procedures of the Panel operate as one aspect of the collective bargaining process. International Brotherhood of Electrical Workers, AFL-CIO, Local 121, 10 FLRA 198, 199 (1982). Under these circumstances, Respondent IRS clearly interfered with employees' rights guaranteed by the Statute. Department of the Treasury and Internal Revenue Service, 22 FLRA No. 89 (1985).

In finding that the Respondent IRS violated the Statute in these circumstances, the Authority notes the relationship between this case and the Authority's decision in Department of the Treasury and Internal Revenue Service, 22 FLRA No. 89 (1986). The allegations against the IRS in that case were dismissed because the IRS had merely engaged in the ministerial act of forwarding contractual language directed by the Panel to Treasury for agency head review and thereafter failing to incorporate the Panel directed language because of the determination by Treasury to disapprove such language. Under those circumstances, where the complaint alleged and the Authority found that Treasury had committed an unfair labor practice by disapproving the Panel-directed language and the Authority was able to issue an order against Treasury which effectively remedied the unfair labor practice found, the Authority--consistent with precedent--dismissed the complaint against IRS because it would not effectuate the purposes and policies of the Statute to find an additional cumulative violation against subordinate level management. U.S. Department of Justice and Department of Justice, Bureau of Prisons, Washington, D.C. and Federal Correctional Institution, Danbury, Connecticut, 20 FLRA No. 5 (1985), enf'd, 792 F.2d 25 (2d Cir. 1986). In this case, however, where the complaint did not charge Treasury with a violation but named only IRS and its subordinate activities as Respondents, the Authority concludes that it would effectuate the purposes and policies of the Statute to find a violation against IRS. That is, such a finding here would not be merely cumulative but is essential if the unfair labor practice committed is to be effectively remedied. A conclusion that the complaint against IRS must be dismissed because Treasury was not named as a Respondent would preclude a remedy for the violation of statutory rights which occurred here, a result which we conclude would be inconsistent with Congressional intent. Therefore, we find that Respondent IRS violated section 7116(a)(1) of the Statute and shall order it to remedy the violation found.

B. Determinations Regarding the Allegations Against the Austin District and Houston District of the Internal Revenue Service

The Authority concludes that the allegations against the Austin and Houston Districts of the Internal Revenue Service should be dismissed since their denial of official time for travel and the refusal to pay travel and per diem expenses for union negotiators was made pursuant to a national policy determination by the Internal Revenue Service. There is no evidence in the record that such offices had the discretion to approve official time for travel purposes or that they were authorized to pay the travel and per diem expenses at issue herein. This result is consistent with the Authority's determination in other cases that subordinate activities do not additionally violate the Statute by their ministerial actions in implementing the directives of higher level management, where higher level management is found to have violated the Statute. Departments of the Army and the Air Force National Guard Bureau and Montana Air National Guard, 10 FLRA 553 (1982), rev'd. on other grounds, sub nom. Montana Air National Guard v. FLRA, 703 F.2d 577 (9th Cir. 1984).

C. Issues Regarding the Alleged Violation of Section 7116(a)(1) and (8) of the Statute

The Authority turns next to the allegation of the complaint that Respondents violated section 7116(a)(1) and (8) of the Statute by failing to grant official time for travel and to pay travel and per diem expenses to union negotiators because such payments are required by section 7131(a) of the Statute. In its Supplemental Decision and Order in United States Department of the Treasury, Internal Revenue Service and United States Department of the Treasury, Internal Revenue Service Austin District, 14 FLRA 818 (1984), the Authority modified the decision it had issued in that case prior to the United States Supreme Court's decision in Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1983). Based on the Supreme Court's decision, the Authority dismissed the allegations of the complaint pertaining to the Respondent's failure and refusal to reimburse its employees for their travel and per diem expenses. However, the Authority left intact those portions of the decision finding that the entitlement to official time by employees involved in representing the exclusive representative included necessary travel time to and from negotiations as occurred during the employees' regular work hours and when they would otherwise have been in a work or paid leave status. The Authority's order directed the agency to make such employees whole for any annual leave utilized. Respondent IRS herein likewise violated section 7116(a)(1) and (8) of the Statute when it denied employees official time for travel in violation of section 7131(a) of the Statute. Nothing in the Supreme Court's decision overturned the Authority's determination that an employee's right to official time to participate in negotiations under section 7131(a) of the Statute includes official time for travel to and from such negotiations.

V. Remedy

To remedy the unfair labor practice conduct, the Authority will order the Respondent IRS to comply with the Panel's Opinion and Decision, and to give it retroactive effect. See Interpretation and Guidance, 15 FLRA 564 (1984), affirmed sub nom. American Federation of Government Employees, AFL-CIO v. FLRA, 778 F.2d 850 (D.C. Cir. 1985). Consistent with the Authority's decisions in Department of the Treasury, Internal Revenue Service, Columbia District, Columbia, South Carolina, 22 FLRA No. 28 (1986) and Office of the General Counsel, National Labor Relations Board, 22 FLRA No. 25 (1986), the Authority will further order the Respondent IRS to make whole the Charging Party for the expenses it incurred, if any, in paying the travel and per diem expenses of those bargaining unit employees who attended mid-term bargaining sessions during the period at issue, which payments otherwise would have been made by the Respondent IRS under the Panel-imposed agreement provisions. Additionally, if there are any bargaining unit employees who either did not receive payments to which they were entitled or were not compensated fully for such expenses, the Respondent IRS also will be ordered to reimburse them for the travel and per diem expenses they incurred upon their submission of properly documented claims for such payments. In ordering such payments, the Authority notes that by not complying with the Panel's decision, the Respondent IRS assumed a risk that, if its position did not prevail, it would be found to have committed an unfair labor practice and be subject to such a remedy.[3] Of course, the payments that are here being ordered must be consistent with law and regulations, including the Federal Travel Regulations.

VI. Payment of Attorney Fees

In its brief to the Authority, the Charging Party requests that it be granted attorney fees under the Equal Access to Justice Act and the Back Pay Act. These requests are denied. With regard to the granting of attorney fees under the Equal Access to Justice Act (EAJA), the Authority's regulations provide that awards under the EAJA are available only to a respondent, other than the United States, who prevails against the General Counsel in an unfair labor practice proceeding.[4] Therefore, the Union, as a charging party, is not entitled to an award of attorney fees under that Act. Internal Revenue Service (District, Region, National Office Units), 16 FLRA 904 (1984).

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[3] If the Respondent Internal Revenue Service's position ultimately had been sustained, however, it would not have been found in violation of the Statute. See Office of Personnel Management, Washington, D.C., 17 FLRA 302 (1985).

[4] Section 2430.2(b) of the Authority's Rules and Regulations provides:

(Continued)

The Authority also concludes that the Charging Party's request for attorney fees under the Back Pay Act is ill-founded. It is well established that an award of attorney fees under the Back Pay Act must be based upon a finding that an unjustified or unwarranted personnel action has been committed which has deprived an aggrieved employee of "pay, allowances, or differentials" that the employee would have earned or received if that action had not occurred. In other words, the award of fees must be in conjunction with an award of backpay to the employee(s) on correction of the unwarranted personnel action. See, for example, Naval Air Development Center, Department of the Navy and American Federation of Government Employees, Local 1928, AFL-CIO, 21 FLRA No. 25 (1986), and cases cited therein. While the refusal of Respondent IRS to comply with a lawful Panel order may have constituted an unwarranted personnel action which resulted in the denial of travel and per diem expenses to certain employees, travel and per diem expenses are not "pay, allowances, or differentials" within the meaning of the Back Pay Act and therefore an order requiring reimbursement of those expenses does not amount to an award of backpay. Rather, as the Authority has previously held, the "pay, allowances, or differentials" encompassed by the Back Pay Act constitute "normal legitimate employee benefits" in the nature of employee compensation or emoluments which do not extend to reimbursement payments such as per diem. Community Services Administration and National Council of CSA Locals, AFGE, AFL-CIO, 7 FLRA 206, 208-209 (1981). In the Authority's view, the reimbursement of travel expenses in this context similarly cannot be equated with backpay so as to justify an award of attorney fees.

VII. Conclusion

Based on the stipulated record, the analysis of the facts and the precedent cited above, the Authority concludes that Respondent Internal Revenue Service violated section 7116(a)(1) and (8) of the Statute when it failed to provide

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Continued

> (b) A respondent in an unfair labor proceeding which has prevailed in the proceeding, or in a significant and discrete portion of the proceeding, and who otherwise meets the eligibility requirements of this section, is eligible to apply for an award of attorneys fees and other expenses allowable under the provisions of § 2430.4 of these rules.

official time for travel purposes to union representatives and when it failed to include in its national agreement and thereafter implement Panel-imposed provisions which provided for the granting of official time for travel, and travel and per diem expenses to employees participating on behalf of the employees' exclusive representative in collective bargaining negotiations.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Internal Revenue Service shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute by failing and refusing to cooperate in and comply with the Decision and Order of the Federal Service Impasses Panel issued on December 24, 1980, Case No. 80 FSIP 68, by failing to implement the provisions directed by the Panel.

(b) Failing and refusing to provide official time, including necessary travel time as occurs during the employees' regular work hours and when the employees would otherwise be in a work or paid leave status, to Antonio Ovalle and Frank Robinson, or any other bargaining unit employee, while engaged in representing the National Treasury Employees Union, the employees' exclusive representative, in collective bargaining negotiations.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Comply with the Decision and Order of the Federal Service Impasses Panel issued on December 24, 1980, in Case No. 80 FSIP 68, which contained contractual provisions to be included in the negotiated agreement between the Internal Revenue Service and the National Treasury Employees Union, and notify the Union of such compliance in writing.

(b) Make the National Treasury Employees Union whole for the cost, if any, incurred in paying travel expenses and per diem allowances to all bargaining unit employees who have submitted appropriate claims for such payments under the terms of the contract provisions which the Federal Service Impasses Panel ordered incorporated into the parties' agreement, for which the employees otherwise would have been reimbursed by the Internal Revenue Service.

(c) Pay travel expenses and per diem allowances consistent with law and regulation, including the Federal Travel Regulations, to all bargaining unit employees who submit or previously submitted appropriate claims for such payments under the terms of the contract provisions which the Federal Service Impasses Panel ordered incorporated into the parties' agreement, to the extent that such expenses have not been reimbursed by the National Treasury Employees Union.

(d) Provide Union representatives Antonio Ovalle and Frank Robinson official time while they were engaged in representing the National Treasury Employees Union, the employees' exclusive representative, in collective bargaining negotiations between November 23 and 24, 1981, including necessary travel time as occurred during the employees' regular work hours and when they would otherwise have been in a work or paid leave status, and make them whole for any annual leave they may have utilized for this purpose.

(e) Post at its Austin and Houston District Offices a copy of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commissioner of the Internal Revenue Service, or Deputy Commissioner, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said Notices are not altered, defaced, or covered by any other material.

(f) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VI, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with the Order.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges a violation of section 7116(a)(1) and (8) by the Internal Revenue Service for denying travel and per diem expenses under section 7131(a) of the Statute, be, and it hereby is, dismissed.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges a violation of section 7116(a)(1) and (8) of the Statute by the Austin and Houston District Offices of the Internal Revenue Service, be, and it hereby is, dismissed.

Issued, Washington, D.C. October 31, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(23 FLRA No. 100)

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute by failing and refusing to cooperate in and comply with the Decision and Order of the Federal Service Impasses Panel issued on December 24, 1980, Case No. 80 FSIP 68, by failing to implement the provisions directed by the Panel.

WE WILL NOT fail and refuse to provide official time, including necessary travel time as occurs during the employees' regular work hours and when the employees would otherwise be in a work or paid leave status, to Antonio Ovalle and Frank Robinson, or any other bargaining unit employees, while engaged in representing the National Treasury Employees Union, the employees' exclusive representative, in collective bargaining negotiations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL comply with the Decision and Order of the Federal Service Impasses Panel issued on December 24, 1980, in Case No. 80 FSIP 68, which contained contractual provisions to be included in our negotiated agreement with the National Treasury Employees Union, and will notify the Union of such compliance in writing.

WE WILL make the National Treasury Employees Union whole for the cost, if any, incurred in paying travel expenses and per diem allowances to all bargaining unit employees who have submitted appropriate claims for such payments under the terms of the contract provisions which the Federal Service Impasses Panel ordered incorporated into the parties' agreement for which the employees otherwise would have been reimbursed by the Internal Revenue Service.

WE WILL pay travel expenses and per diem allowances consistent with law and regulation, including the Federal Travel Regulations, to all bargaining unit employees who submit or previously submitted appropriate claims for such payments under the terms of the contract provisions which the Federal Service Impasses Panel ordered incorporated into the parties' agreement, to the extent that such expenses have not been reimbursed by the National Treasury Employees Union.

WE WILL provide Union representatives Antonio Ovalle and Frank Robinson official time while they were engaged in representing the National Treasury Employees Union, the employees' exclusive representative, in collective bargaining negotiations between November 23 and 24, 1981, including necessary travel time as occurred during the employees' regular work hours and when they would otherwise have been in a work or paid leave status, and make them whole for any annual leave they may have utilized for this purpose.

____
(Activity)

Dated: ____________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VI, Federal Labor Relations Authority, whose address is: 525 Griffin Street, Suite 926, Dallas, TX 75202, and whose telephone number is: (214) 767-4996.

23 FLRA No. 101

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FARMERS HOME ADMINISTRATION FINANCE
OFFICE, ST. LOUIS, MISSOURI

Respondent

and

Case No. 7-CA-30560
(19 FLRA No. 21)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3354

Charging Party

DECISION AND ORDER ON REMAND

I. Statement of the Case

This case is before the Authority pursuant to a remand from the United States Court of Appeals for the District of Columbia Circuit. The question before the Authority is whether it was an unfair labor practice under the Federal Service Labor-Management Relations Statute (the Statute) for the Respondent (Agency) to refuse a request, made pursuant to section 7114(b)(4) of the Statute, to provide the Charging Party (Union) with the names and home addresses of employees in a bargaining unit which the Union exclusively represents.

For the reasons which follow, we conclude that Respondent's refusal to provide the information violated the Statute, and we reverse the Authority's previous decision in this matter.

II. Procedural Background

In a previous decision in this case, Farmers Home Administration Finance Office, St. Louis, Missouri, 19 FLRA No. 21 (1985), the Authority, relying on the decision of the United States Court of Appeals for the Fourth Circuit in American Federation of Government Employees, Local 1923 v. United States Department of Health and Human Services, 712 F.2d 931 (4th Cir. 1983), held that the release of home addresses was not required pursuant to section 7114(b)(4) of the Statute because the disclosure of such information was "prohibited by law," specifically the Privacy Act.[1]

The Charging Party/Union in this case, and the unions involved in other cases in which the Authority followed the precedent established by this case, petitioned the courts for review of the Authority's decisions. In the course of the litigation that ensued, it became apparent that an issue raised before the Authority regarding the applicability of the Privacy Act had not been addressed by the Authority in rendering its decision in this case--namely, whether the union was entitled to the names and home addresses of unit employees under the routine use exception of the Privacy Act, 5 U.S.C. § 552a(b)(3). The Authority therefore sought remand of this case and three other substantially identical cases awaiting judicial review in order to reconsider its decisions and to address in the first instance the issue of whether disclosure of the names and home addresses of unit employees was or was not prohibited by law because of the applicability of the "routine use" exception of the Privacy Act, and such other issues arising under the Statute as might be appropriate. The remand requests were granted in this case, American Federation of Government Employees, Local 3354 v. FLRA, No. 85-1493 (D.C. Cir.) (reviewing 19 FLRA No. 21), and in two others, National Federation of Federal Employees, Local 1827 v. FLRA, No. 85-2202 (8th Cir.) (reviewing 19 FLRA No. 85) and Philadelphia Metal Trades Council v. FLRA, No. 85-1625 (D.C. Cir.) (reviewing 19 FLRA No. 107).

In contrast to the D.C. and Eighth Circuits, the United States Court of Appeals for the Second Circuit denied the Authority's remand request and issued a decision. In that decision the Second Circuit reversed the Authority's holding that the release of names and home addresses was "prohibited by law," i.e., the Privacy Act, under section 7114(b)(4) of the Statute. American Federation of Government Employees, Local 1760 v. FLRA, 786 F.2d 554 (2nd Cir. 1986). The Second Circuit applied the same balancing test used by the Authority. Contrary to the Authority and the Fourth Circuit, however, the court found that "the privacy interest of the average employee in his address is not particularly compelling." Id. at 556. Instead, the court noted

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[1] Privacy Act of 1974, 5 U.S.C. § 552a (1982).

Congress' determination that collective bargaining is in the public interest, and the court's prior holdings in private sector cases that the mere existence of alternative means of communication is not sufficient to justify the refusal to release home addresses. The court also noted that it agreed with the Administrative Law Judge that the alternative means available to the union were inadequate, and that the other requirements of the Statute for release had been met. The court therefore remanded that case (19 FLRA No. 108) to the Authority to find a violation and require the Respondent to disclose unit employees' home addresses to the union. The court did not address the "routine use" issue.

In order to give full consideration to the issues raised as to the disclosure of names and home addresses to exclusive representatives in the instant case, and in the other cases remanded by the D.C. and Eighth Circuits as well as other pending cases, the Authority issued a notice in the Federal Register, 51 Fed. Reg. 21,416 (1986), providing an opportunity for all interested agencies, labor organizations, and other interested persons to file *amicus* briefs dealing with these issues. The Authority has considered these submissions, as well as the entire record in this case, in reaching its decision. Although the parties in this case did not submit supplementary statements in response to the Federal Register notice, the American Federation of Government Employees did file an *amicus* brief outlining its position on the issues presented by these cases.

III. Analytical Framework and Previous Decision

As relevant to this case, section 7114(b)(4) of the Statute requires an agency to furnish to an exclusive representative, upon request and to the extent not prohibited by law, data which is (1) normally maintained by the agency in the regular course of business; and (2) reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. In the previous decision in this case, the Authority held that the release of names and home addresses was not required pursuant to section 7114(b)(4) because disclosure was "prohibited by law," specifically the Privacy Act.

The Privacy Act generally prohibits the disclosure of personal information about Federal employees without their consent. Section (b)(2) of the Privacy Act provides that the prohibition against disclosure is not applicable if disclosure of the information is required under the Freedom of Information Act (FOIA).[2] Exemption (b)(6) of the FOIA provides that information contained in personnel files (as well as medical and other similar files) may be withheld if disclosure of the information would constitute a "clearly unwarranted invasion of personal privacy[.]"

Applying the balancing test developed by the Federal courts in cases concerning the (b)(6) exemption to the FOIA, the Authority weighed the public interest which would be served by providing the Union with names and home addresses against the employees' interests in maintaining their privacy. The Authority concluded that "the employees' strong privacy interest in their home addresses outweighs the necessity of the data for the Union's purposes in the circumstances of this case." 19 FLRA No. 21 at 4. Since the information requested by the Union fell within the (b)(6) exemption, disclosure of the information was not required under the FOIA. Therefore, the Authority found that the requirements of the (b)(2) exception to the Privacy Act were not met and disclosure of the information was prohibited. The Authority also found that the record established that the Union had "alternative means of . . . communication available." Id. Because of the finding that disclosure of the information was prohibited by law, the Authority did not address whether the Union's request met the other requirements of section 7114(b)(4).

IV. Analysis on Remand

Consistent with the requirements of section 7114(b)(4), it is necessary to determine whether (1) disclosure of the names and home addresses of bargaining unit employees is prohibited by law, (2) the information is normally maintained by the Agency in the regular course of business, (3) the Union properly requested the information, and (4) the information is reasonably available and necessary within the meaning of that section. These issues will be addressed in turn.

A. Prohibited by Law

Provisions of the Privacy Act and the Freedom of Information Act are relevant to the determination of whether the disclosure of the information is prohibited by law. The

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[2] Freedom of Information Act, 5 U.S.C. § 552 (1982).

Authority previously held that disclosure was prohibited by the Privacy Act. There are two exceptions to the Privacy Act's bar to disclosure which are applicable to this discussion: exception (b)(2) concerning the Freedom of Information Act, and exception (b)(3) relating to "routine use" of information.

1. FOIA

If the disclosure of the requested information is required by the FOIA, the Privacy Act's bar to disclosure is not applicable. 5 U.S.C. § 552a(b)(2). Under the FOIA, requested information must be disclosed unless it falls within one of the enumerated exemptions. The exemption pertinent to this case is exemption (b)(6) which authorizes withholding information in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]"

In the previous decision in this case, the Authority balanced employees' privacy interests against the public interest in disclosure and found that the requested information fell within exemption (b)(6). In doing so, the Authority relied on the decision of the Court of Appeals for the Fourth Circuit in AFGE Local 1923, 712 F.2d 931. For the following reasons, we reverse our previous decision on this point and find that the requested information may not be withheld pursuant to exemption (b)(6).

It is necessary to balance competing interests to determine whether requested information falls within exemption (b)(6). It is also important to recognize, as emphasized in the amicus submissions filed by various labor organizations, that the FOIA embodies "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." Department of Air Force v. Rose, 425 U.S. 352, 360-61 (1976). Further, exemption (b)(6)'s limitation to "clearly unwarranted" disclosures instructs us to "tilt the balance in favor of disclosure." Getman v. NLRB, 450 F.2d 670, 674 (D.C. Cir. 1971).

Consistent with this framework, we find that the balance favors disclosure of the names and home addresses sought by the Union. In section 7101 of the Statute Congress found that collective bargaining in the Government is in the public interest and safeguards that interest. The disclosure of the information sought would enable the Union to identify the members of the bargaining unit which it is required to represent. Disclosure also would contribute to the Union's ability to communicate with its bargaining unit members and thereby enable it to better fulfill its responsibilities under the Statute. If employees are to exercise their statutory rights, they must be aware of the issues affecting them. By providing the Union with an efficient method of communication, disclosure of names and home addresses will facilitate the fullest exercise of employee rights.

On further consideration of this case, we also agree with the Court of Appeals for the Second Circuit that "the privacy interest of the average employee in his address is not particularly compelling." 786 F.2d at 556. For example, while amicus submissions by individuals indicate that some employees do not favor the release of their names and home addresses, many of the submissions also show that these employees already receive and often discard unsolicited mail. There is, of course, nothing to prevent these employees from handling communications from the Union in the same way, nor are employees prevented from requesting that they be deleted from the Union's mailing list. As noted by the Second Circuit, a union already has access to information such as salary levels that is more likely to implicate privacy concerns than the information sought here. Id.

On balance, we find that the public interest to be furthered by providing the Union with an efficient method to communicate with unit employees it must represent far outweighs the privacy interests of individual employees in their names and home addresses. Disclosure of the requested information would not constitute a clearly unwarranted invasion of personal privacy and does not fall within the (b)(6) exemption to the FOIA. Since the information does not fall within the exemption, its disclosure is required under the FOIA and, under exception (b)(2) to the Privacy Act, its release is not prohibited by law.

2. Routine Use

Exception (b)(3) of the Privacy Act permits disclosure of information for a "routine use." Section (a)(7) of the Privacy Act defines routine use as "the use of such record for a purpose which is compatible with the purpose for which it was collected." The Office of Personnel Management (OPM) publishes notices defining the routine uses of personnel records of Federal employees. One notice defines a routine use as the disclosure of information to "officials of labor organizations recognized under 5 U.S.C. Chapter 71 when relevant and necessary to their duties of exclusive representation[.]" 49 Fed. Reg. 36,956 (1984). This standard is effectively the same as section 7114(b)(4)'s limitation of an agency's obligation to provide information to that which is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining[.]"

As discussed below, we conclude that the disclosure of the names and home addresses of bargaining unit employees to the Union is necessary within the meaning of section 7114(b)(4) of the Statute for the Union to discharge its statutory obligations. Consistent with that conclusion, we find that disclosure of the information sought here falls within the routine use established by OPM, and its disclosure is therefore a routine use under exception (b)(3) of the Privacy Act. Therefore, even if the disclosure was not authorized under exception (b)(2) of the Privacy Act, relating to the FOIA, it is authorized under exception (b)(3).

Release of the requested information is therefore not prohibited by law. It may be released pursuant to exceptions (b)(2) and (3) of the Privacy Act.

B. Normally Maintained by the Agency

The Administrative Law Judge found that the names and home addresses sought by the Union were maintained by the Respondent in Official Personnel Files (OPFs), a card index system, and a computer file. He concluded that the information was normally maintained in the regular course of business. We agree and find that the requested information is normally maintained by the Agency in the regular course of business within the meaning of section 7114(b)(4) of the Statute.

We note that although OPM retains responsibility for OPFs, they are physically maintained by employing agencies. While agency *amici* question whether OPFs are the best source for current home addresses, the Department of Justice notes in its *amicus* submission that there is "no question that the home addresses of federal employees . . . are in their personnel files."

C. Union Request

The Union requested in writing the names and home addresses of bargaining unit employees to enable it to prepare for contract negotiations. Although not raised in this case, some *amicus* submissions questioned whether a request must be tied to a specific issue about which the union needs to communicate with its bargaining unit members.

As discussed throughout this decision, a union's statutory obligations involve a broad range of representational activities. We find that the statutory requirement concerning sufficiency of a request under section 7114(b)(4) is satisfied for requests such as that involved here when a general written request for the information is made. A precise explication of the reasons for the request involved here is not necessary. The requirement for a request was met in this case.

Our conclusion that a written request for names and home addresses need not contain an explanation of the reason for the request is consistent with previous decisions where we held that an agency's duty to furnish other information under section 7114(b)(4) of the Statute turns on the nature of the request and the circumstances of each case. *For example*, *Department of Health and Human Services, Social Security Administration and Social Security Administration, Field Operations, New York Region*, 21 FLRA No. 35 (1986). In our view, an exclusive representative's need for the names and home addresses of the bargaining unit employees it is required to represent is so apparent and essentially related to the nature of exclusive representation itself, that unlike requests for certain types of other information, an agency's duty to supply names and home addresses information does not depend upon any separate explanation by the union of its reasons for seeking the information.

D. Reasonably Available and Necessary

As discussed previously in connection with the statutory requirement that the requested information be normally maintained by the agency, the names and home addresses of bargaining unit employees are contained in OPFs and, in this case, the ALJ found that the information was also available through an index system and a computer file. The information is reasonably available within the meaning of section 7114(b)(4).

As for whether the information is necessary for unions to discharge their responsibilities under the Statute, the amicus submissions show disagreement among the parties. Generally, unions argued that the disclosure of names and home addresses is necessary for them to meet their statutory obligations. Agencies contended that these obligations could be fulfilled without disclosure of the information, through effective alternative means of communication.

Section 7114(a)(1) of the Statute provides that an exclusive representative is responsible for representing the "interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." Under this provision, a union's statutory responsibilities extend to all bargaining unit members. It is obvious that a union must be able to identify and communicate with those bargaining unit members if it is to adequately represent them.

Consistent with the amicus submissions of many agencies, the ALJ in this case found that the disclosure of names and home addresses was unnecessary because other means of communication, such as desk drops, direct distributions, meetings, bulletin boards, and direct personal contacts were available to the Union and provided adequate means of communication. We disagree. The disclosure of names and home addresses will enable the Union to communicate effectively and efficiently, through direct mailings to individual employees. The information is readily available within Agency files and its disclosure will enhance the exercise of employee rights as well as the communication process between employees and the Union.

We will not review the adequacy of alternative methods of communication on a case-by-case basis. Consistent with the view of the Court of Appeals for the Second Circuit discussed above, we find that the mere existence of alternative means of communication is insufficient to justify a refusal to release the information. Further, we find that it is not necessary for us to examine the adequacy of alternative means in cases involving requests for names and home addresses because the communication between unit employees and their exclusive representative which would be facilitated by release of names and home addresses information is fundamentally different from other communication through alternative means which are controlled in whole or in part by the agency. When using direct mailings, the content, timing, and frequency of the communication is completely within the discretion of the union and there is no possibility of agency interference in the distribution of the message. Further, direct mailings reach unit employees in circumstances where those employees may consider the union's communication without regard to the time constraints inherent in their work environments, and in which any restraint the employee may feel as a result of the presence of agency management in the workplace is not present. We find that the names and home addresses of unit employees are necessary and should be provided whether or not alternative means of communication are available.

Our decision that names and home addresses information should be released is consistent with private sector precedent.3/ The National Labor Relations Board has held that names and addresses of unit employees are "presumptively relevant to [a] [u]nion's role as bargaining agent either during contract negotiations or during the term of an agreement." Georgetown Holiday Inn, 235 NLRB 485, 486 (1978).4/ The Board has not treated the presumption

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3/ The National Labor Relations Act (NLRA) does not contain a provision equivalent to section 7114(b)(4) of the Statute. Rather, unions' rights to receive information are an outgrowth of the obligation to bargain in good faith under section 8(a)(5) of the NLRA. For a discussion of the private sector obligation see NLRB v. Acme Industrial Company, 385 U.S. 432 (1967). See also Prudential Insurance Co. v. NLRB, 412 F.2d 77 (2d Cir.), cert. denied, 396 U.S. 928 (1969), where the court rejected the company's arguments that providing names and home addresses was unnecessary because adequate alternative means of communication (bulletin boards, grievance committees, hand distributions, and union meetings) were available to the union. As for the relevance of the information, the court stated that "[i]t seems manifest beyond dispute that the Union cannot discharge its obligation unless it is able to communicate with those in whose behalf it acts." Id. at 84.

4/ See also Armstrong World Industries, Inc., 254 NLRB 1239, 1244 (1981), where the Administrative Law Judge, whose decision was adopted by the Board, cited the Board's previous decision in Autoprod, Inc., 223 NLRB 773 (1973), and stated that the Autoprod decision "appears to state flatly that a union is entitled to the addresses of unit employees, whether or not those addresses could be obtained by other means and, a fortiori, whether or not the union might be able to disseminate information to unit employees by other means than mailing." This statement also appears in the ALJ's decision in Harco Laboratories, Inc., 271 NLRB 1397, 1398 (1984), which was also adopted by the Board.

favoring the disclosure of names and home addresses as an irrebuttable one. Disclosure need not be made in situations where, for example, the evidence discloses that a union has acted in a manner which leads to the conclusion that the employees whose addresses would be disclosed would be in imminent danger if the union knew where they lived. *See, for example*, *Shell Oil Co. v. NLRB*, 457 F.2d 615 (9th Cir. 1972). There is no such contention in this case.

V. Conclusion

We have considered the entire record in this case as well as the *amicus* submissions filed in response to our notice in the *Federal Register*. We conclude that the release of names and home addresses to the Union is not prohibited by law, is necessary for the Union to fulfill its duties under the Statute, and meets the other requirements of section 7114(b)(4).

Respondent was required to furnish the names and home addresses requested by the Union without regard to whether alternative means of communication were available or adequate. Respondent's refusal to furnish the requested information violated section 7116(a)(1), (5) and (8) of the Statute.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is ordered that the Farmers Home Administration Finance Office, St. Louis, Missouri shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request of the American Federation of Government Employees, AFL-CIO, Local 3354, the exclusive representative of its employees, the names and home addresses of all employees in the bargaining unit it represents.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request by the American Federation of Government Employees, AFL-CIO, Local 3354, the exclusive representative of its employees, furnish it with the names and home addresses of all employees in the bargaining unit it represents.

(b) Post at all its facilities where bargaining unit employees represented by the American Federation of Government Employees, AFL-CIO, Local 3354 are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a senior official of the Farmers Home Administration Finance Office, St. Louis, Missouri, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., October 31, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(23 FLRA No. 101)

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request of the American Federation of Government Employees, AFL-CIO, Local 3354, the exclusive representative of our employees, the names and home addresses of all employees in the bargaining unit it represents.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request by the American Federation of Government Employees, AFL-CIO, Local 3354, the exclusive representative of our employees, furnish it with the names and home addresses of all employees in the bargaining unit it represents.

____
(Agency or Activity)

Dated: ________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VII, Federal Labor Relations Authority, whose address is: 535 16th Street, Suite 310, Denver, Colorado 80202 and whose telephone number is: (303) 837-5224.

23 FLRA No. 102

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF JUSTICE
BUREAU OF PRISONS

Agency

and

Case No. 0-AR-1236

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1741

Union

ORDER DISMISSING EXCEPTIONS

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Barry C. Brown filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The matter submitted to arbitration concerned the grievant's removal from the Federal Service. Before addressing the merits of the grievance, the Arbitrator determined that the Union had failed to comply with the procedural requirements of the parties' collective bargaining agreement for invoking arbitration and that these procedural defects were highly prejudicial to the Agency's rights. Accordingly, he concluded that the grievance was not arbitrable and that it must be dismissed. The Union's exceptions in this case are to the Arbitrator's determination that the grievance was not arbitrable.

II. ANALYSIS AND CONCLUSIONS

We conclude that we are without jurisdiction to review the Union's exceptions. Section 7122(a) provides, in part:

> Either party to arbitration under this chapter may

> file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title).

As relevant to this case, the matters described in section 7121(f) of the Statute include adverse actions under 5 U.S.C. § 7512, such as a removal. Review of an arbitration award relating to such matters must be obtained in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board. *Veterans Administration Medical Center, Kansas City, Missouri and American Federation of Government Employees*, 23 FLRA No. 40 (1986.) In that regard, determinations of procedural arbitrability by arbitrators in grievances concerning adverse actions under 5 U.S.C. § 7512 may be reviewed by the U.S. Circuit Court of Appeals for the Federal Circuit. *See Huey v. Department of Health and Human Services*, 782 F.2d 1575 (Fed. Cir. 1986).

Because the Arbitrator's award in this case relates to the matter of the grievant's removal, exceptions to the award may not be filed with the Authority under section 7122(a) of the Statute. To the extent that the Authority's decision in *Naval Ordnance Station Louisville, Kentucky and Lodge No. 830, International Association of Machinists and Aerospace Workers*, 11 FLRA 19, 20 n.3 (1983), is contrary to our holding in this case, that decision will no longer be followed.

IV. DECISION

Accordingly, the Union's exceptions are dismissed.

Issued, Washington, D.C., October 31, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

23 FLRA No. 103

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

FEDERAL UNION OF SCIENTISTS AND
ENGINEERS, NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES, LOCAL R1-144

Union

and Case No. O-NG-1267

U.S. DEPARTMENT OF NAVY, NAVAL
UNDERWATER SYSTEMS CENTER

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

The petition for review in this case comes before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). It raises an issue concerning the negotiability of one Union Proposal to grant "super seniority" to Union officials and stewards in a reduction-in-force. For the following reasons we hold that the proposal is nonnegotiable.

II. Union Proposal

> Union officials and stewards shall for the purposes of reduction-in-force during their official tenure of office be considered the most senior employees in their competitive level and tenure status.

III. Positions of the Parties

The Agency contends that this proposal conflicts with management's right under section 7106(a)(2)(A) to remove employees in that it would compel the Agency to remove other employees before removing union officials and stewards in a reduction-in-force (RIF). Additionally, it argues that the proposal is inconsistent with a Government-wide rule or regulation--specifically, the Office of Personnel Management (OPM) regulations found at 5 CFR Part 351.

The Union disputes the Agency's assertion that this proposal is nonnegotiable. It asserts that there is no Agency regulation for which a compelling need exists which bars negotiation of this proposal.[1]

IV. Analysis and Conclusions

A. The Proposal Conflicts with a Management Right

This proposal would require that, in a RIF, the Agency consider union officials and stewards to be senior to all other employees who are in the same competitive level and have the same tenure status. Absent any contrary statement by the Union, we interpret the terms "competitive level" and "tenure status" in this proposal as having the same respective meanings ascribed to the terms "competitive level" and "tenure group" in the OPM regulations governing RIF's.[2] "Competitive level" is a grouping of positions based on their similarity. Employees are placed in a "tenure group" based on the nature of their appointment, for example, career, career-conditional, or indefinite. In American Federation of Government Employees, Local 2612, AFL-CIO and Department of the Air Force, Headquarters, 416th Combat Support Group (SAC), Griffiss Air Force Base, New York, 19 FLRA No. 117 (1985) (Union Proposal 2), the Authority held nonnegotiable a proposal requiring union officers and stewards to be the last employees in a given job classification to be removed in the event of a RIF. The Authority reasoned that the proposal would violate the agency's right to remove employees under section 7106(a)(2)(A) by compelling first removal of employees who were not union officials and stewards. This proposal is to the same effect. In a RIF action it would, similarly to the proposal in Griffiss AFB, compel the Agency to remove other employees in a given competitive level and tenure group prior to removing Union officers and stewards. For the reasons stated in Griffiss AFB and the cases cited in that decision, the Authority finds that this proposal directly interferes with the Agency's right under section 7106(a)(2)(A) to remove employees.

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[1] The Agency does not assert before us that negotiations on the proposal are barred by an Agency regulation. Therefore, we need not further address this Union claim.

[2] 5 CFR Part 351 and FPM Letter 351-20, subchapter 3.

B. The Proposal Conflicts with a Government-wide Rule or Regulation

The OPM RIF regulations prescribe several specific criteria by which employees must be ranked for purposes of determining their relative retention standing within a competitive level. 5 CFR §§ 351.501-351.506 (1986). Under those regulations an employee's retention standing is determined by the combination of tenure group, subgroup (veterans preference status), length of service and annual performance ratings. Because the proposal would award greatest seniority within a tenure group to Union officials and stewards, based on their union office, it is inconsistent with these regulations. These regulations are Government-wide rules or regulations. *National Treasury Employees Union, NTEU Chapter 202 and Department of the Treasury, Bureau of Government Financial Operations*, 22 FLRA No. 58 (1986). The proposal is, therefore, not within the duty to bargain.

V. Order

Pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Union's petition for review be, and it hereby is, dismissed.

Issued, Washington, D.C., October 31, 1986.

J Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(Order Denying Request for Reconsideration
of 22 FLRA No. 106)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1923

Union

and

Case No. 0-NG-1216
(22 FLRA No. 106)*

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, OFFICE OF THE SECRETARY
OFFICE OF THE GENERAL COUNSEL
BALTIMORE, MARYLAND

Agency

ORDER DENYING MOTION FOR RECONSIDERATION

This case is before the Authority on a motion for reconsideration filed by the Agency on October 1, 1986, seeking reconsideration of the Authority's Decision and Order of July 31, 1986. For the reason set forth below, the motion must be denied.

Section 2429.17 of the Authority's Rules and Regulations, effective September 10, 1981, provides in pertinent part:

> 2429.17 Reconsideration.
>
> After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. The motion shall be filed within 10 days after service of the Authority's decision or order. . . .

The Authority's Decision and Order was dated and served on the Agency by mail on July 31, 1986. Therefore, under section 2429.17 of the Authority's Rules and Regulations, and sections 2429.21 and 2429.22, which are also applicable to the computation of the time limit here involved, the Agency's motion for reconsideration was due in the national office of the Authority before the close of business on August 18, 1986. Since, as indicated above, the Agency's motion was not filed until October 1, 1986, it is clearly untimely and must be denied.

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* Corrected

Accordingly, the Agency's motion for reconsideration is denied.

For the Authority.

Issued, Washington, D.C., October 28, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

(Decision on Motion for Reconsideration
of 18 FLRA No. 28)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
DETROIT DISTRICT

Respondent

and

Case No. 5-CA-20218
(18 FLRA No. 28)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2130, AFL-CIO

Charging Party

DECISION ON MOTION FOR RECONSIDERATION

I. Statement of the Case

This matter is before the Authority on a motion by the Charging Party (the Union) for reconsideration of the Authority's decision in Department of the Army, U.S. Army Corps of Engineers, Detroit District, 18 FLRA No. 28 (1985).1/

II. The Authority's Decision

The unfair labor practice complaint alleged that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to bargain over the Union's proposal concerning the competitive area which the Respondent would use in a reduction-in-force (RIF). In concluding that the complaint should be dismissed, the Authority determined that the disputed proposal was outside the duty to bargain, relying on regulations of the Office of Personnel Management (OPM) codified at 5 CFR § 351.402(b) (1984).

1/ The Respondent's "Response to Charging Party's Motion For Reconsideration" was not timely filed and has not been considered.

III. The Motion for Reconsideration

The Union, in its timely motion for reconsideration, asserts that the 1984 OPM regulations relied upon by the Authority had not yet become effective at the time of our Decision. It further asserts that, in any event, the Authority should have applied the OPM regulations that were in effect at the time the alleged unfair labor practice occurred.

The Union's first assertion is correct. At the time of our Decision, Congress had temporarily barred implementation of the 1984 regulations, and the United States District Court for the District of Columbia had ordered that the provisions codified at 5 CFR § 351.402 (1983) be reissued in 5 CFR § 351.402 (1984 Supp.). See National Federation of Federal Employees v. Devine, 591 F. Supp. 166 (D.D.C. 1984). Further, the regulations that were in effect at the time the alleged unfair labor practice occurred (February 11, 1982) were those codified at 5 CFR § 351.402 (1982).

The Authority finds that, pursuant to section 2429.17 of our Rules and Regulations, the Union has established a basis for reconsideration.

IV. Analysis on Reconsideration

While we agree that the 1982 regulations were those in effect at the time the alleged unfair labor practice occurred, rather than the judicially blocked 1984 regulations,[2] this does not change the result in this case.

Since the issuance of our Decision in this case, the Authority has reviewed the extent to which proposals concerning competitive areas are negotiable. On remand from the United States Court of Appeals for the District of Columbia Circuit, the Authority was directed to explain an apparent inconsistency between its holdings in Association of Civilian Technicians, Pennsylvania State Council and

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[2] Those regulations eventually became effective on September 30, 1985. American Federation of Government Employees v. Office of Personnel Management, 618 F. Supp. 1284 (D.D.C. 1985). OPM has again recently revised these Government-wide RIF regulations. 5 CFR § 351.402(b), 51 Fed. Reg. 318 (1986).

Pennsylvania Army and Air National Guard, 14 FLRA 38 (1984) (ACT), and American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 14 FLRA 754 (1984) (Local 32). Local 32, American Federation of Government Employees v. FLRA, 774 F.2d 498 (D.C. Cir. 1985).

In its Decision and Order on Remand in Local 32, the Authority stated as follows:

> In summary, the proposals in both the ACT and Local 32 cases would have directly determined the conditions of employment of bargaining unit employees. The critical difference between the proposals lies in the nature and degree of the impact they would have on nonunit employees. The competitive area proposed in ACT only affected conditions of employment of nonunit employees indirectly: it excluded them from the negotiated competitive area. The proposed competitive area in Local 32, in contrast, consistent with the requirements of applicable OPM regulations, encompassed nonbargaining unit employees in the negotiated competitive area. It directly determined, that is, prescribed, their competitive area.
>
> Consistent with this analysis, in all cases since Local 32 dealing with competitive areas where an agency has objected to bargaining based upon the fact that a proposed competitive area would directly determine nonunit employees' conditions of employment, the Authority has held the proposals to be outside the mandatory obligation to bargain.

American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 22 FLRA No. 49, slip op. at 8 (1986), petition for review filed sub nom. American Federation of Government Employees, Local 32 v. FLRA, No. 86-1447 (D.C. Cir. Aug. 11, 1986).

Accordingly, proposals that limit competitive areas to bargaining unit employees, but are silent as to what competitive areas non-unit employees would be in, do not directly determine or prescribe non-unit employees' competitive areas. Therefore, such proposals are not outside the duty to bargain on that basis. However, these proposals must also be consistent with applicable regulations. For the reasons that follow, we find that in the case now before us on reconsideration, the Union proposal is outside the duty to bargain because it is inconsistent with applicable OPM regulations.

The regulations bearing on this subject as codified in 5 CFR § 351.402 (1982) provided, in pertinent part, as follows:

> § 351.402 Competitive area.
>
> (a) Each agency shall establish competitive areas in which employees compete for retention under this part.
>
> (b) The standard for a competitive area is that it include all or that part of an agency in which employees are assigned under a single administrative authority. A competitive area in the departmental service meets this standard when it covers a primary subdivision of an agency in the local commuting area. A competitive area in the field service meets this standard when it covers a field installation in the local commuting area.
>
> (c) An agency may establish a competitive area larger than one that meets the standard named in paragraph (b) of this section. In exceptional circumstances, and with the prior approval of the Office [of Personnel Management], an agency may establish a competitive area smaller than one that meets the standard named in paragraph (b) of this section. Agencies which have been delegated individual authority to do so may establish competitive areas smaller than named in paragraph (b) of this section, with prior approval of the Office[.]

The Charging Party's proposal in this case sought to negotiate for a competitive area limited to the employees it represents in bargaining units within the Respondent's Detroit District. The Detroit District is an identifiable agency organizational unit and geographical location. However, the Detroit District also encompasses other employees and other bargaining units not represented by the Charging Party. The competitive area proposed by the Charging Party therefore does not satisfy the OPM 1982 regulations, as it does not include all of the employees within the Respondent's Detroit District.[3]

V. Conclusion

We conclude that the Charging Party's proposal, considered under OPM provisions published at 5 CFR § 351.402 (1982), was outside the duty to bargain. The Respondent by refusing to bargain on the Charging Party's competitive area proposal therefore did not violate section 7116(a)(1) and (5) of the Statute. Accordingly, we reaffirm our Order that the complaint in this proceeding be dismissed.

Issued, Washington, D.C., October 31, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[3] OPM's revised regulations, 5 CFR § 351.402 (1984), explicitly provide that a competitive area "must include all employees within the competitive area so defined." As discussed above at note 2, those regulations became effective on September 30, 1985. OPM's recently revised regulations are to the same effect. 5 CFR § 351.402(b), 51 Fed. Reg. 318 at 321 (1986).

regulations; it does not include all of the employees within the Respondent's Detroit District.3/

V. Conclusion

We conclude that the Charging Party's proposal, considered under OPM provisions published at 5 CFR § 351.402 (1983), was outside the duty to bargain. The Respondent, by refusing to bargain on the Charging Party's competitive area proposal therefore did not violate section 7116(a)(1) and (5) of the Statute. Accordingly, we reaffirm our order that the complaint in this proceeding be dismissed.

Issued, Washington, D.C., October [illegible], 1985.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

3/ OPM's revised regulations, 5 CFR § 351.402 (1986) explicitly provide that a competitive area "must include all employees within the competitive area so defined." As discussed above at note 1, those regulations became effective on September 30, 1985. OPM's recently revised regulations are to the same effect. 5 CFR § 351.402(b), [illegible] 321 (1986).

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES COUNCIL OF LOCALS
LOCAL 2723

Union

and

Case No. 0-AR-1235

DEFENSE LOGISTICS AGENCY
DCASAR, LOS ANGELES

Agency

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Gerald A. McKay filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., October 30, 1986.

J Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

GENERAL SERVICES ADMINISTRATION

Agency

and

Case No. 0-AR-1205

AMERICAN FEDERATION OF GOVERNMENT
EMPOYEES, AFL-CIO, LOCAL 236

Union

DECISION

This matter is before the Authority on exceptions to the award of Arbitrator Louis Aronin filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

Upon careful consideration of the entire record before the Authority, the Authority concludes that the Union has failed to establish that the Arbitrator's award is deficient on any of the grounds set forth in section 7122(a) of the Statute; that is, that the award is contrary to any law, rule, or regulation, or that the award is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations.

Accordingly, the Union's exceptions are denied.

Issued, Washington, D.C., October 31, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

9/case 401

Federal
Labor Relations
Authority

Washington, D.C. 20424

NUMBER 401 REPORT OF CASE DECISIONS November 8, 1986

UNFAIR LABOR PRACTICE CASES

23 FLRA No. 104 (October 31, 1986)

Department of Health and Human Services, Social Security Administration, Dallas Region, Dallas, Texas and American Federation of Government Employees, AFL-CIO, National Council of Social Security Administration-Field Operations Locals, Case No. 6-CA-785; Department of Health and Human Services Social Security Administation, McAllen District Office, McAllen, Texas and American Federation of Government Employees, Local 3388, AFL-CIO, Case No. 6-Ca-1034; Department of Health and Human Services Social Security Administration, El Paso District Office, El Paso, Texas and American Federation of Government Employees, Local 2991, AFL-CIO, Case Nos.6-CA-1053, 6-CA-1053-1, 6-CA-1054 and 6-CA-1055

NEWARK PUBLIC LIBRARY

DEC 19 1986

U. S. GOVT. PUBS.
DEPOSITORY 378

23 FLRA No. 105 (October 31. 1986)

Department of the Army, Fort Greely, Alaska and Department of the Army, 172d Infantry Brigade (Alaska), Fort Richardson, Alaska and Department of the Army, Headquarters, U.S. Army Forces Command, Fort McPherson, Georgia and Department of the Army, The Pentagon, Washington, D.C. and American Federation of Government Employees, Local 1949, AFL-CIO, Case No. 9-CA-1204

Y3.F31/21-3:

Federal Labor Relations Authority

23 FLRA No. 104
HHS, SSA, Dallas Region, Dallas Tex. and AFGE, National Council of SSA Field Operations Locals, Case No. 6-CA-785; HHS, SSA, McAllen District Office, McAllen, Tex. and AFGE, Local 3388, Case No. 6-CA-1034; HHS, SSA, El Paso District Office, El Paso, Tex. and AFGE, Local 2991, Case Nos. 6-CA-1053, 1053-1, 1054 and 1055
(Oct. 31, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practices	7114(a)(2)(A)
Agency Violations (Alleged)	7114(b)(4)
Refusal to Negotiate	7116(a)(1), (5) and (8)
Bypassing Union	7118

- Unfair Labor Practices
  - Agency Violations (Alleged)
    - Refusal to Negotiate
      - Bypassing Union
      - Failing to Elevate Negotiates to the National Level
      - Instructing a Lower Agency Level to Implement a Plan
    - Otherwise Refuse to Comply with the Statute
      - 7114(a)(2)(A) and 7114(b)(4)
  - Formal Discussions
  - Information
  - Remedy
    - Bargaining Order
      - Parties May Agree to Retroactive Application of Agreement
    - Remedial Notice - Posting Region-wide
    - Status Quo Ante - Not Warranted
      - Congressional Time Mandate
      - Mandate of Civil Service Reform Act (1978)

DIGEST NOTES

The agency's regional office did not violate section 7116(a)(1) and (5) by failing to elevate negotiations concerning the promulgation and implementation of a "Personnel Guide for Supervisors" (PGS). Although the parties did not execute a formal agreement concerning their alternative bargaining arrangements, they had other arrangements for bargaining below the level of exclusive recognitions. The union's national council delegated bargaining authority to subordinate officials and the delegation of authority was communicated to the agency's officials with the intent that they should be effective.

The agency's regional office violated section 7116(a)(1) and (5) by instructing its sub-regional offices to implement the provisions of its new "Personnel Guide for Supervisors" (PGS)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

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without bargaining with the exclusive representative. The PGS provided a framework under which management officials of sub-offices would establish performance goals for employees, provide measures for documentation employee performance, and provide counselling to employees regarding their performance. The implementation of the PGS constituted a substantial change in conditions of employment.

Sub-regional offices did not violate sections 7116(a)(1) and (5) by refusing to bargain over the implementation of provisions in the "Personnel Guide for Supervisors" (PGS) which resulted in substantial changes in conditions of employment. The sub-regional offices were merely conduits in carrying out instructions from their regional office. The regional offices violated the Statute for refusing to negotiating over the implementation of the changes. Accordingly the Authority held that it would not effectuate the purposes and policies of the Statute to find a separate additional violation based upon the actions of officials in the sub-regional offices.

Sub-regional offices bypassed the exclusive representative in violation of section 7116(a)(1) and (5) by meeting with their employees individually and in groups, for the purpose of receiving the employees' input and soliciting employee suggestions on the preparation of plans to implement the provisions of a new "Personnel Guide for Supervisors". The new plans represented a substantial change in conditions of employment. Although this conduct by the management officials of the sub-regional offices was the result of the instructions received from its regional office, no bypass violation was alleged against the regional office. Accordingly, the sub-regional management must bear the responsibility for this action.

A district office conducted formal discussions with its employees without affording the union an opportunity to be present in violation of section 7114(a)(2)(A) and 7116(a)(1) and (8). Neither was the union notified in advance of the meetings nor was a representative actually present at the meetings.

Information requested by the union was not "necessary" for collective bargaining purposes so as to give rise to an agency responsibility to provide the information under section 7116(b)(4). The data sought by the union consisted of drafts of proposed plans formulated by the district office and sent to the area director for review. The drafts were not final until the review. The local union president advised the district director that the local would not take a position as to the acceptability of any plan, until the area director had acted on the drafts sent to him. The local could learn nothing significant about the impact on conditions of employment from the draft plans. What a lower level of management felt about the proposed plans before they were reviewed by the area director would have little practicable value to the local union and, thus, were not "necessary" to collective bargaining.

A status quo ante remedy is neither necessary nor appropriate that would require the withdrawal of accountability plans and the destruction of certain documentation that resulted from employing those plans. The plans and subsequent actions were the result of the implementation of provisions of a new "Personnel Guide for Supervisors" (PGS) that was formulated pursuant to the Civil Service Reform Act of 1978 and which had a Congressional time mandate for implementation. Although the regional office of the agency failed to negotiated over the impact and implementation of the PGS, in violation of section 7116(a)(1) and (5), a prospective bargaining order is more appropriate under circumstances where potential disruption to an agency's operations is substantial.

A region-wide posting of the remedial notice is appropriate in circumstances where the regional office ordered all its subordinate offices not to bargain with the union although only certain subordinate offices were actually named in the complaint and found to have violated the Statute.

to him. The local could learn nothing significant about the impact on conditions of employment from the draft plans. What a lower level of management felt about the proposed plans before they were reviewed by the area director would have little practicable value to the local union and thus were not necessary to collective bargaining.

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A remedy requiring posting of the remedial notice is appropriate in circumstances where the regional office ordered all of its subordinate offices not to bargain with the union, although only certain subordinate offices were actually named in the complaint and found to have violated the Statute.

Federal Labor Relations Authority

23 FLRA No. 105
Dep't of the Army, Fort Greely, Alaska and Dep't of the Army, 172d Infantry Brigade (Alaska), Fort Righcardson, Alaska and Dep't of the Army, H.Q., U.S. Army Forces Command, Fort McPherson, Ga. and Dep't of the Army, The Pentagon, Washington, D.C. and AFGE, Local 1949, Case No. 9-CA-1204 (Oct. 31, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Unfair Labor Practices	7103(a)(14
Agency Violations	7114(b)(2)
Refusal to Negotiate	7116(a)(1) and (5)
Post Exchange and Commissary Privileges	
Collective Bargaining Process	7117(b)
Delegation of Authority	7118
Compelling Need Inapposite if Defense Based on Delegation	
Duty to Provide Representatives Empowered to Negotiate	
Compelling Need	
May Appropriately be Resolved in ULP Proceedings	
Conditions of Employment, Changes in	
Withdrawal of Commissary and Post Exchange Privileges	
Remedy	
Status Quo Ante	

DIGEST NOTES

The agency violated section 7116(a)(1) and (5) when it refused to bargain over the decision to terminate commissary and post exchange privileges for civilian personnel living off base. The privileges had been continued for a long period of time as part of the fort's civilian workforce relationship; were routinely used to encourage civilians to accept employment at the fort's geographically isolated location; and constituted one of the few incentives to ease the extreme difficulty in filling authorized civilian positions and to improve morale. Accordingly, the matter of withdrawing commissary and post exchange privileges from unit employees at the fort concerned conditions of employment under section 7103(a)(14).

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

The activity had a duty to bargain over a change in conditions of employment despite its allegation that agency regulations did not delegate control over the subject matter to management officials at the level of bargaining but retained such authority at a higher level of the agency. The Authority held that an agency may not foreclose bargaining on an otherwise negotiable matter because authority has not been delegated to the level of exclusive recognition. Under section 7114(b)(2), an agency is obligated to provide representatives at the level of bargaining who are authorized to negotiate and enter into agreements on all matters within the scope of bargaining, and this statutory obligation cannot be obviated by an agency's internal regulations.

The activity's argument that there was not duty to bargain because such matters are the subject of internal agency regulations and the Authority has not determined under section 7117(b) that no compelling need exists for those regulations is misplaced. The argument is inapposite when the basis of the agency's argument concerns the delegation of authority rather than compelling need within the meaning of section 7117. Even assuming that the argument were relevant, the activity's position is inconsistent with established Authority precedent. The Authority has held and reaffirmed that compelling need determinations may appropriately be decided in an unfair labor practice proceedings.

The Authority dismissed the complaint against the agency where there was neither a bargaining relationship between the union and the agency at the agency level nor evidence that the agency interfered with the fulfillment of the bargaining obligation between its subordinate activity and the exclusive representative at that level.

A status quo ante remedy is warranted for the activity's failure to bargain with the union over the decision to withdraw commissary and post exchange privileges from civilian personnel who worked at a remote military installation. Where management makes a unilateral change in a negotiable term and conditions of employment, the imposition of status quo ante remedy is required, absent special circumstances, in order not to render meaningless the mutual obligation to negotiate under the Statute.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
DALLAS REGION, DALLAS, TEXAS

Respondent

and Case No. 6-CA-785

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, NATIONAL COUNCIL
OF SOCIAL SECURITY ADMINISTRATION-
FIELD OPERATIONS LOCALS

Charging Party

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
McALLEN DISTRICT OFFICE, McALLEN, TEXAS

Respondent

and Case No. 6-CA-1034

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3388, AFL-CIO

Charging Party

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
EL PASO DISTRICT OFFICE, EL PASO, TEXAS

Respondent

and Case Nos. 6-CA-1053
6-CA-1053-1
6-CA-1054
6-CA-1055

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2991, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Cases

This consolidated proceeding is before the Authority on exceptions filed by the Respondents and the General Counsel to the attached Decision of the Administrative Law Judge. The issues in this proceeding involve the promulgation of a "Personnel Guide for Supervisors" (PGS) by the Dallas Region of the Social Security Administration, Department of Health and Human Services, the Respondent in Case No. 6-CA-785. It was alleged in that case that the Dallas Region violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by promulgating the PGS without affording the exclusive representative of its employees an appropriate opportunity to bargain concerning its contents. It is alleged in Case No. 6-CA-1034 and Case Nos. 6-CA-1053 - 1055, respectively, that the McAllen District Office and El Paso District Office violated various provisions of the Statute, set forth below, by their conduct in implementing the PGS upon its receipt from the Dallas Region.

II. Background

The exclusive representative, American Federation of Government Employees, AFL-CIO, National Council of Social Security Administration-Field Operations Locals (AFGE National Council), represents a nationwide consolidated unit of non-professional employees of the Social Security Administration in Field Operations. The unit encompasses employees in offices of the Dallas Region, including employees at the McAllen and El Paso District Offices. The AFGE National Council represents employees in the unit at the national level. For more localized matters, it provides for representation through Regional Vice Presidents and local union affiliates; for example, at the McAllen District Office by American Federation of Government Employees, Local 3388, AFL-CIO, and at the El Paso District Office by American Federation of Government Employees, Local 2991, AFL-CIO.

In 1980 the Dallas Region promulgated the PGS. It was intended to provide a framework under which management officials of sub-offices of the Dallas Region would establish performance goals for employees, provide measures for documenting employee performance, and provide counselling to employees regarding their performance. The PGS was prepared by collecting and consolidating various policies which at least in substantial part had existed in written form in certain other guides, manuals and directives.

The PGS was forwarded to sub-offices for action, including the Region's McAllen and El Paso District Offices. Upon receipt of the PGS, the management officials in the sub-offices were to consult with their employees and prepare employee performance goals and employee performance accountability plans using quantitative measures based on the character of the work performed in their offices and the work actually performed by employees in their official positions. These actions were taken by the McAllen and El Paso District Offices, and the McAllen District Office reached the point of forwarding its draft plans to the Dallas Region for review and comment and having the plans returned for further action.

III. Case No. 6-CA-785 (Dallas Regional Office)

A. The Judge's Findings and Conclusions

The Judge found that the Dallas Region had provided advance notice of the PGS and an opportunity to negotiate concerning its contents to the AFGE National Council Vice President for the Dallas Region. In response to the contention that the PGS should have been elevated to the national level for negotiations at that level, the Judge noted that bargaining at the national level is necessary where exclusive recognition is at that level, but that the parties at the level of exclusive recognition may agree to authorize bargaining below that level as they deem appropriate. She found that the parties herein had provided for arrangements under which changes in conditions of employment which were initiated below the national level and which were confined to subordinate organizational levels, for example, at the Regional level, would be subject to bargaining at that level and that the actions taken by the Dallas Region were in conformance with these arrangements. She concluded, accordingly, that the Dallas Region did not violate section 7116(a)(1) and (5) of the Statute by failing to elevate negotiations concerning its PGS to the national level.

The Judge also concluded that the implementation of the PGS by management officials of the Dallas Region's sub-offices was a substantial change in working conditions that had a reasonably foreseeable adverse effect on the employees in those offices. She found that the implementation constituted a change in conditions of employment of unit employees giving rise to a duty to negotiate as to the impact and implementation of the change. She concluded that the Dallas Region violated section 7116(a)(1) and (5) of the Statute by instructing the McAllen and El Paso District Offices to implement the PGS without bargaining with the exclusive representative of their respective employees.

B. The Positions of the Parties

The Respondents excepted to the Judge's finding that the Dallas Region unlawfully refused to bargain over the impact and implementation of the PGS by instructing its District Offices not to bargain. They further excepted to her finding that there was a duty to bargain at the District Office level (here McAllen and El Paso). The Respondents argue that the only duty was at the Regional Office level, and that the duty was met at that level. They further argue that, as the Judge found that the Dallas Regional Office was justified in refusing to elevate negotiations to the national level, and that this was the only demand by the Union, none of the violations alleged against the Dallas Region can be found.

The General Counsel excepted to the Judge's failure to find that the Dallas Region unlawfully refused to elevate negotiations to the national level. It argues that the nature of the matter was appropriate for bargaining only at the national level and that the Union had never agreed to bargain on this specific matter at the Regional level.

C. Analysis

First, the Authority agrees with the Judge that the Dallas Region did not violate the Statute by failing to elevate negotiations concerning its PGS to the national level. The Authority notes that although the record does not show that the parties executed a formal agreement concerning their alternative bargaining arrangements, it does show that these other arrangements for bargaining below the level of exclusive recognition arose out of delegations of authority from the AFGE National Council to its subordinate officials; that the delegations were communicated to the Respondents' officials with the intent that they should be effective; that the arrangements were in conformance with and extensions of the parties' previously existing practices; and that the parties' respective representatives at the Regional level understood that these arrangements were in place at the time that the Dallas Region promulgated its PGS. It has not been alleged or shown that the Dallas Region misunderstood or acted contrary to these arrangements. We find no merit in the AFGE National Council's contention that the Dallas Region's PGS should only have been negotiated at the national level; its contention was based only on the view that negotiations at the national level regarding a nationwide contract would result in agreements which might require subsequent revisions in the actions of the Dallas Region.

The Authority also agrees with the Judge that the implementation of the PGS was a substantial change in the daily operations of the Dallas Region's sub-offices that had a reasonably foreseeable adverse effect on the employees in those offices. We note that there were no exceptions to this finding of the Judge. We thus concur in the Judge's conclusion that the implementation constituted a change in conditions of employment of unit employees that gave rise to a duty to bargain as to the impact and implementation of the change, and that the Dallas Region violated section 7116(a)(1) and (5) of the Statute by instructing the McAllen and El Paso District Offices to implement the PGS without bargaining with the exclusive representative.

IV. Case No. 6-CA-1034 (McAllen District Office) and Case Nos. 6-CA-1053 - 1055 (El Paso District Office)

A. The Judge's Findings and Conclusions

The complaints in these cases alleged that:

(1) the McAllen and El Paso District Offices, as well as the Dallas Region, violated section 7116(a)(1) and (5) of the Statute by unlawfully refusing to bargain with the exclusive representative of its respective employees;

(2) both the McAllen and the El Paso District Offices also violated section 7116(a)(1) and (5) of the Statute by dealing directly with employees and thus unlawfully "bypassing" the exclusive representative of its respective employees;

(3) the El Paso District Office further violated section 7116(a)(1) and (5) by breaching its negotiated agreement requiring the negotiation of changes in working conditions;

(4) the McAllen District Office violated section 7114(a)(2)(A) and thereby section 7116(a)(1) and (8) of the Statute by holding "formal discussions" with its employees without affording Local 3388 the opportunity to be present; and

(5) the El Paso District Office violated section 7114(b)(4) and thereby section 7116(a)(1) and (8) of the Statute by refusing to supply Local 2991 with certain requested information.

The Judge found that:

(1) both the McAllen and El Paso District Offices followed the instructions of the Dallas Region, in fact refused to bargain with the exclusive representatives of their respective employees, and thus violated the Statute;

(2) both the McAllen and El Paso District Offices also violated the Statute by dealing directly with, and thereby unlawfully bypassing the exclusive representative of, their respective employees;

(3) resolution of the issue concerning the alleged breach of the collective bargaining agreement by the El Paso District Office was unnecessary, as it would add nothing to the decision or the recommended remedy;

(4) the McAllen District Office held formal discussions with its employees without affording Local 3388 the opportunity to be present and thereby violated the Statute; and

(5) the El Paso District Office did not violate the Statute by refusing to supply certain requested information because it was not shown that the information was "necessary" or that it was "normally maintained" within the meaning of the Statute.

B. The Positions of the Parties

The Respondents' position, as set forth above, is that the only duty to bargain was at the Regional Office level and that therefore no failure of a duty to bargain can be found against the McAllen or El Paso District Offices. The General Counsel agrees with the violations the Judge found, but excepts to her failure to find that the El Paso District Office unlawfully refused to furnish requested information. In this regard, the General Counsel excepts to the rationale the Judge used in determining that the information was not necessary, and to the Judge's use of the standard that the information must have been "normally maintained."

C. Analysis

While we agree with the Judge, as found above, that the Dallas Region violated the Statute by instructing its McAllen and El Paso District Offices not to bargain, we do not agree that those offices also violated the Statute by refusing to bargain. The McAllen and El Paso offices were acting only as conduits in carrying out the instructions of the Dallas Region. In these circumstances, it would not effectuate the purposes and policies of the Statute to find a separate violation based upon the actions of officials in those District Offices. See, for example, Department of Health and Human Services, Washington, D.C. and Department of Health and Human Services, Region 7, Kansas City, Missouri, 16 FLRA 288 (1984) and cases cited therein. Thus, the allegations against the McAllen and El Paso District Offices in this regard in Case Nos. 6-CA-1034 and 6-CA-1053 - 6-CA-1055 shall be dismissed.

With regard to the allegations that the management officials at McAllen and El Paso bypassed the exclusive representative, the Dallas Region instructed these officials to implement the PGS without bargaining with the exclusive representative and to implement the PGS after consulting with employees regarding the employees' own accountability plans. The McAllen and El Paso management officials followed these instructions by meeting with their employees, individually and in groups, for the purpose and effect of receiving the employees' input and soliciting employee suggestions on the preparation of the plans. Upon these findings, the Authority concludes that the McAllen District Office and the El Paso District Office engaged in conduct which bypassed the exclusive representative in violation of section 7116(a)(1) and (5). See Department of Transportation, Federal Aviation Administration, Los Angeles, California, 15 FLRA 100 (1984); Social Security Administration, Baltimore, Maryland, 9 FLRA 909, 911 (1982). Although this conduct by the management officials at McAllen and El Paso was the result of the instructions received from the Dallas Region, no bypass violation was alleged against the Dallas Region. Accordingly, McAllen and El Paso management must bear the responsibility for this action. See United States Department of the Treasury, Internal Revenue Service and Internal Revenue Service, Austin District, and Internal Revenue Service, Houston District, 23 FLRA No. 100 (1986).

As to the third allegation that the El Paso District Office further violated the Statute by breaching its negotiated agreement, we agree with the Judge's conclusion that it is unnecessary to reach this issue. The Judge made no separate findings in this regard, and there were no exceptions to this portion of the Judge's decision.

Regarding the allegation that the McAllen District Office conducted formal discussions with employees in conflict with section 7114(a)(2)(A) of the Statute and thereby violated section 7116(a)(1) and (8), the Authority has concluded, in Veterans Administration, Veterans Administration Medical Center, Muskogee, Oklahoma, 19 FLRA No. 122 (1985), that actual representation by an exclusive representative at a formal discussion is sufficient to demonstrate compliance with the statutory requirement that an exclusive representative "be given the opportunity to be represented." The Authority further stated that: "Neither section 7114(a)(2)(A) nor its legislative history supports a conclusion that Congress intended that a union representative must be given notification of a formal discussion in advance, specifically in his or her capacity as a union official." However, based on the Judge's findings that the exclusive representative did not receive notice which would apprise it of when the meetings would occur and that the exclusive representative was not in fact represented at these meetings, we conclude that the McAllen District Office did not provide the exclusive representative with "the opportunity to be represented at" these meetings. By such conduct the McAllen District Office acted contrary to section 7114(a)(2)(A) and thereby violated section 7116(a)(1) and (8) of the Statute. Since it has not been shown that the instructions of the Dallas Region mandated this conduct, the McAllen District Office bears the sole responsibility for this violation. See, for example, Kansas Army National Guard and National Guard Bureau, 10 FLRA 303 (1982).

With regard to the additional allegation that the El Paso District Office failed and refused to provide information to the exclusive representative as required under section 7114(a)(2)(A), the Authority concurs with the Judge's reasoning and conclusion that this allegation should be dismissed on the basis that the information so requested was not "necessary" for collective bargaining so as to give rise to the Respondent's duty to furnish the information. In view of this conclusion, we find it unnecessary to pass upon the Judge's additional reasoning that the information was not the type of data "normally maintained in the regular course of business."

V. Conclusions

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and affirms those rulings. The Authority has considered the Judge's Decision, the positions of the parties and the entire record, and adopts the Judge's findings, conclusions and recommended Order to the extent consistent with this decision.

We conclude that the Respondent Dallas Regional Office violated section 7116(a)(1) and (5) of the Statute by instructing the McAllen and El Paso District Offices to implement the PGS without bargaining with the exclusive representative of their respective employees. We also conclude that the McAllen and El Paso District Offices violated section 7116(a)(1) and (5) of the Statute by dealing directly with employees and thus unlawfully bypassing the exclusive representative of their respective employees. We further conclude that the McAllen District Office violated section 7114(a)(2)(A) and thereby violated section 7116(a)(1) and (8) of the Statute by conducting formal discussions with its employees without affording its exclusive representative the opportunity to be represented at those discussions.

VI. Remedy

The Judge, among other things, ordered the withdrawal of accountability plans and the destruction of certain documentation that resulted from employing those plans; that is, a status quo ante order. In our view, such a remedy is not warranted here. We have balanced the nature and circumstances of the violations against the degree of disruption in Government operations that would be caused by such a remedy, and have taken into consideration the various factors set forth in Federal Correctional Institution, 8 FLRA 604 (1982), in making this determination.

The accountability plans here were formulated pursuant to the PGS. There is no question that management had a right to issue the PGS, which was formulated pursuant to the mandate of the Civil Service Reform Act (1978) to all agencies to develop specific critical elements and performance standards. Moreover, a Congressional time mandate was involved. As the Judge found, the Union was on notice of the agency's intended actions, although it was not given an opportunity to negotiate over the impact and implementation of those actions. We also note, as indicated above, that a status quo ante remedy involving the withdrawal of accountability plans or the destruction of documentation that resulted from employing those plans would seriously disrupt the efficiency of the agency's operations.

In these circumstances, we find that a status quo ante remedy is neither required nor necessary in order to effectuate the purposes and policies of the Statute. An appropriate remedy for the violations which we find in these cases can be obtained by requiring the Dallas Region to instruct its McAllen and El Paso District Offices to bargain (1) on the manner in which employees will participate in the preparation of employee accountability plans required by the Personnel Guide for Supervisors, (2) on the implementation of those accountability plans, and (3) on the procedures and appropriate arrangements for employees whose performance appraisals have been adversely affected by such accountability plans.

Furthermore, as we have stated in issuing prospective bargaining orders and rejecting contentions that a status quo ante remedy should be granted under circumstances where the potential disruption to an agency's operations was substantial:

> A prospective bargaining order is neither inadequate nor inherently restrictive of the parties' right to address the effects on unit employees of changes already made. . . . Rather, it allows the parties the flexibility to bargain freely with regard to how past actions may have affected any given employee. Bargaining which explores such effects may itself reveal situations that call for retroactive remedial action, about which the parties are free to agree.

Environmental Protection Agency, 21 FLRA No. 98 (1986), slip op. at 3-4, quoted in Federal Aviation Administration, 23 FLRA No. 28 (1986), slip op. at 10.

Based on the foregoing, we find that it is neither necessary nor appropriate for us to order adversely affected employees to be made whole, although that may be the result of the parties' bargaining which we are ordering. We shall also issue appropriate orders to remedy the bypass and formal discussions violations by the McAllen and El Paso District Offices.

We find merit in the General Counsel's exception to the limited scope of the posting ordered by the Judge. The Dallas Region ordered all its subordinate offices not to bargain with AFGE. We therefore find it appropriate and shall order that the Notice to be signed by the Dallas Region be posted at the Regional Office and at all subordinate offices throughout the Region, including the McAllen and El Paso District Offices.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Authority hereby orders that:

A. The Department of Health and Human Services, Social Security Administration, Dallas Region, Dallas, Texas, shall:

1. Cease and desist from:

(a) Directing its subordinate offices which are represented by the American Federation of Government Employees, AFL-CIO, National Council of Social Security Administration-Field Operations Locals (AFGE), the exclusive representative of its employees, not to bargain with AFGE over the employee accountability plans formulated by these offices, pursuant to the Personnel Guide for Supervisors distributed by the Dallas Region in September 1980.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request of the American Federation of Government Employees, AFL-CIO, National Council of Social Security Administration-Field Operations Locals (AFGE), the exclusive representative of its employees, instruct the McAllen District Office and the El Paso District Office to bargain with the exclusive representative on the manner in which employees will participate in the preparation of employee accountability plans required by the Personnel Guide for Supervisors issued by the Dallas Region in September 1980, on the implementation of those accountability plans, and on the procedures and appropriate arrangements for employees whose performance appraisals have been adversely affected by accountability plans formulated without employee participation established through negotiations with AFGE.

(b) Upon the request of the exclusive representative, instruct the McAllen District Office and the El Paso District Office to give notice to AFGE Locals 3388 and 2991, respectively as appropriate, of any future employee accountability plans proposed for implementation, and extend to the appropriate Local an opportunity to engage in appropriate bargaining prior to implementing such plans.

(c) Post at the Dallas Regional Office and provide for posting at all subordinate offices of the Dallas Region where the employees are represented by AFGE, copies of the attached Notice to be furnished by the Federal Labor Relations Authority. Copies of said Notice shall be signed by the Regional Commissioner for the Dallas Region, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VI, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

B. The Department of Health and Human Services, Social Security Administration, McAllen District Office, McAllen, Texas, shall:

1. Cease and desist from:

(a) Failing to afford representatives of the American Federation of Government Employees, Local 3388, AFL-CIO, appropriate notification of and an opportunity to be represented at any formal discussion between one or more representatives of this Office and one or more employees in the exclusive representative's unit at this Office concerning personnel policies and practices and other general conditions of employment.

(b) Bypassing representatives of the American Federation of Government Employees, Local 3388, AFL-CIO, by dealing directly with unit employees regarding the development and implementation of accountability plans pursuant to the Personnel Guide for Supervisors distributed by the Dallas Region in September 1980.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Provide the American Federation of Government Employees, Local 3388, AFL-CIO, with appropriate notification of and an opportunity to be represented at any formal discussion between one or more representatives of this Office and one or more employees in the exclusive representative's unit at this Office concerning personnel policies and practices or other general conditions of employment.

(b) Post at the McAllen District Office, copies of the attached Notice to be furnished by the Federal Labor Relations Authority. Copies of said Notice shall be signed by the District Manager, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VI, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

C. The Department of Health and Human Services, Social Security Administration, El Paso District Office, El Paso, Texas, shall:

1. Cease and desist from:

(a) Bypassing representatives of the American Federation of Government Employees, Local 2991, AFL-CIO, by dealing directly with unit employees regarding the development and implementation of accountability plans pursuant to the Personnel Guide for Supervisors distributed by the Dallas Region in September 1980.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Post at the El Paso District Office, copies of the attached Notice to be furnished by the Federal Labor Relations Authority. Copies of said Notice shall be signed by the District Manager, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VI, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the remaining allegations in the complaints concerning the McAllen District Office and the El Paso District Office of the Department of Health and Human Services, Social Security Administration, in Case Nos. 6-CA-1034, 6-CA-1053, 6-CA-1053-1, 6-CA-1054 and 6-CA-1055 be, and they hereby are, dismissed.

Issued, Washington, D.C., October 31, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT direct our subordinate offices of the Dallas Region which are represented by the American Federation of Government Employees, AFL-CIO, National Council of Social Security Administration-Field Operations Locals (AFGE), the exclusive representative of our employees, not to bargain with AFGE over the employee accountability plans formulated by these offices, pursuant to the Personnel Guide for Supervisors distributed in September 1980.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request of AFGE, instruct the McAllen District Office and the El Paso District Office to bargain with the exclusive representative on the manner in which employees will participate in the preparation of employee accountability plans required by the Personnel Guide for Supervisors distributed in September 1980, on the implementation of those accountability plans, and on the procedures and appropriate arrangements for employees whose performance appraisals have been adversely affected by accountability plans formulated without employee participation established through negotiations with AFGE.

WE WILL, upon request of AFGE, instruct the McAllen District Office and the El Paso District Office to give notice to AFGE Locals 3388 and 2991, respectively as appropriate, of any future employee accountability plans proposed for implementation, and extend to the appropriate Local an opportunity to engage in appropriate bargaining prior to implementing such plans.

Social Security Administration,
Dallas Region

Dated: ______________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Region VI, Federal Labor Relations Authority, 525 Griffin Street, Suite 926, Dallas, Texas 75202, and whose telephone number is: (214) 767-4996.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to afford representatives of the American Federation of Government Employees, Local 3388, AFL-CIO, appropriate notification of and an opportunity to be represented at any formal discussion between one or more representatives of this Office and one or more employees in the exclusive representative's unit at this Office concerning personnel policies and practices and other general conditions of employment.

WE WILL NOT bypass representatives of the American Federation of Government Employees, Local 3388, AFL-CIO, by dealing directly with our employees regarding the development and implementation of accountability plans pursuant to the Personnel Guide for Supervisors distributed by the Dallas Region in September 1980.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL provide the American Federation of Government Employees, Local 3388, AFL-CIO, with appropriate notification of and an opportunity to be represented at any formal discussion between one or more representatives of this Office and one or more employees in the exclusive representative's unit at this Office concerning personnel policies and practices or other general conditions of employment.

Social Security Administration,
McAllen District Office

Dated:________________ By: ____________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Region VI, Federal Labor Relations Authority, 525 Griffin Street, Suite 926, Dallas, Texas 75202, and whose telephone number is: (214) 767-4996.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT bypass representatives of the American Federation of Government Employees, Local 2991, AFL-CIO, by dealing directly with our employees regarding the development and implementation of accountability plans pursuant to the Personnel Guide for Supervisors distributed by the Dallas Region in September 1980.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

Social Security Administration,
El Paso District Office

Dated: ________________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VI, Federal Labor Relations Authority, 525 Griffin Street, Suite 926, Dallas, Texas 75202, and whose telephone number is: (214) 767-4996.

(23 FLRA No. 104)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
DALLAS REGION
DALLAS, TEXAS,

Respondent

and

Case No. 6-CA-785

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO
NATIONAL COUNCIL OF SOCIAL SECURITY
ADMINISTRATION-FIELD OPERATIONS LOCALS,

Charging Party

. . . .

. . . .

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
McALLEN DISTRICT OFFICE
McALLEN, TEXAS,

Respondent

and

Case No. 6-CA-1034

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3388, AFL-CIO,

Charging Party

. . . .

. . . .

DEPARTMENT OF HEALTH AND HUMAN SERVICES .
SOCIAL SECURITY ADMINISTRATION .
EL PASO DISTRICT OFFICE .
EL PASO, TEXAS, .

Respondent .

and . Case Nos. 6-CA-1053
6-CA-1053-1
6-CA-1054
6-CA-1055

AMERICAN FEDERATION OF GOVERNMENT .
EMPLOYEES, LOCAL 2991, AFL-CIO .

Charging Party .

. . . .

Wilson G. Schuerholz,
For the Respondents

Elizabeth A. Martinez and
James E. Dumerer,
Attorneys for the General Counsel
Federal Labor Relations Authority

Sylvester Overturf,
For the Charging Party

Before: ISABELLE R. CAPPELLO,
Administrative Law Judge

DECISION

This is a proceeding under the Federal Service Labor-Management Relations Statute, 92 Stat. 1191 (1978), 5 U.S.C. §7101 et seq. (Supp. III, 1979) (hereinafter referred to as the "Statute") and the Rules and Regulations of the Federal Labor Relations Authority (hereinafter, the "Authority"), 5 CFR Ch. XIV, §2410 et seq.

Complaints involving three Texas offices of the Social Security Administration were issued on June 25, 1981 (Case Nos. 6-CA-1053, 1053-1, 1054, and 1055), on May 27, 1981 (Case No. 6-CA-1034), and on July 27, 1981 (Case No. 6-CA-785). An Order dated August 26, 1981, consolidated these cases for hearing.

The hearing was held on September 22 and 23, 1981, in Dallas, Texas. The parties appeared, adduced evidence, and examined and cross-examined witnesses. Briefs were submitted on November 9, on behalf of the Respondents, and on November 13, on behalf of the General Counsel. Based upon the record made by the parties, my observation of the demeanor of the witnesses, and the briefs, I make the following findings of fact, conclusions of law, and recommended orders.

Issues

All the issues raised in these cases concern employee accountability plans which the Dallas Regional Office of the Social Security Administration (hereinafter "SSA") ordered formulated by and implemented in the district offices of the Dallas Region. Two district offices, at El Paso and McAllen, are the respondents in two of the complaints. The Dallas Regional Office is the respondent in the third complaint.

Each complaint alleges violations of Sections 7116(a)(1) and (5) of the Statute, in that respondents refused to bargain over the impact and implementation of the plans and subsequently implemented them, unilaterally.

In Case No. 6-CA-1034, concerning the McAllen office, it is alleged that respondent conducted a Section 7114(a)(2)(A) "formal meeting", without affording Local 3388 of the American Federation of Government Employees ("AFGE") an opportunity to be present, thereby violating Sections 7116(a)(1) and (8) of the Statute.

In Case Nos. 6-CA-1053, 1053-1, 1054 and 1055, concerning the El Paso office, it is alleged that respondent refuses to turn over draft proposals for accountability standards, that the drafts constitute necessary and relevant information requested by Local 2991 pursuant to Sections 7114(b)(4) of the Statute, and that, therefore, respondent is violating Sections 7116(a)(1) and (8) of the Statute.

Also, at the El Paso Office, it is alleged that respondent breached a collective bargaining agreement requiring consultation and/or negotiations of changes in working conditions, in violation of Sections 7116(a)(1) and (5).

At both the El Paso and McAllen Offices there is also an allegation that respondents bargained directly with employees, in violation of Sections 7116(a)(1) and (5).

Statutory Provisions Involved

Section 7114(a)(2) provides, in pertinent part, that:

> An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at -

> (A) Any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment ... .

Section 7114(b)(4) provides, in pertinent part, that:

> The duty of an agency and an exclusive representative to negotiate in good faith under subsections (a) of this section shall include the obligation - ...
>
> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data -
>
> (A) which is normally maintained by the agency in the regular course of business;
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.

Section 7116(a) provides, in pertinent part, that:

> For the purpose of this chapter, it shall be an unfair labor practice for an agency -
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; ...
>
> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter; ... or
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

Findings of Fact

1. Since August 30, 1979, AFGE has been the exclusive representative for a nationwide consolidated unit of employees of SSA. Employees of SSA are employed in one central office and in five other components. One of the five components is Field Operations, and is the one here involved. SSA manages its field operations through ten regional offices. The regional offices manage numerous district offices, through area directors.

2. On October 10, 1979, AFGE gave the following explanation to AFGE locals on how consolidation would change bargaining obligations:

> As a practical matter all local changes will be dealt with locally by the union organization which historically held that responsibility. Technically the new level of recognition would require that the Commissioner of Social Security bargain with AFGE National President Blaylock anytime a district manager wanted to change something. But both parties have agreed that an effective LMR program requires that they delegate responsibilities to those in a position to know, to those who are most affected and have historically held the responsibility.

(JtEx-20.2)[1/]

3. On October 18 and December 31, 1979, AFGE and SSA exchanged designations of responsibilities to sub-level representatives.

3a. On October 18, the National President of AFGE, Kenneth T. Blaylock, sent a letter to the Commissioner of SSA in which he outlined delegations of authority to administer the nationwide consolidated unit. AFGE established a general committee composed of a Central-Office local and five National Councils. The National Councils correspond to the five components of SSA.

3b. Each member of the AFGE general committee has a president. The chief spokesperson of the committee is delegated the authority to deal directly with the Commissioner of SSA, or his designee, "on all matters which are national in scope and appropriate under the Civil Service

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[1/] "JtEx" refers to the Joint Exhibits of the parties. Other abbreviations used in this Decision are as follows. "GCEx" refers to the exhibits of the General Counsel, and "REx" refers to those of Respondents. Multipage exhibits will be referenced first by the exhibit number, and then by the page number. "TR" refers to the transcript. "GCBr" refers to the brief of the General Counsel, and "RBr" to that of Respondents.

eform Act ['CSRA']." (JtEx-19.2) The six presidents on the committee re delegated the authority to deal directly with the heads of their espective components on matters which affect their components. The omponent presidents may further delegate authority for those matters hich are local or regional.

3c. On December 31, the Commissioner of SSA replied to Mr. laylock. Management counterparts were designated. The Commissioner greed that issues should be resolved "at the local level whenever possible," but took exception to some views of AFGE on bargaining levels. See JtEx-23. Att. A.

4. Other evidence pertaining to the understanding of the parties as to the appropriate bargaining level includes the following.

4a. On October 21, 1979, the Executive Vice President of the AFGE National Council of SSA Field Operations sent a letter to the Commissioner of SSA to "clarify" delegations of authority in respect to field offices. (JtEx-21.1) The letter advised that there would be ten Regional Vice-Presidents "who shall serve as the chief representative of the Council for Region which he or she represents." (JtEx-21.1), and that "the Regional Vice Presidents must be timely and properly notified of changes in policies and practices which may be bargainable." (JtEx-21.2)

4b. The letter also advised that presidents of locals which had historically held recognition were all Council representatives and should be notified of changes proposed at the local level and given the opportunity to "meet and confer" about the proposals. (JtEx-21.2)

4c. The letter also advised that: "Generally, whenever an issue or matter of LMR [labor-management relations] involves more than one Local of an SSA region, the authority for LMR shall rise to the Regional Vice President of the National Council to act on behalf of the affected Locals of the region." (JtEx-21.3)

4d. Finally, the letter advised "concerning the nature of the authority that we have delegated to our Regional Vice Presidents and to the Local Presidents," that "[a]s representatives of this Council, they shall obtain all rights to this union under law, in particular the right to enforce these rights by complaint of Unfair Labor Practice and the right to bargain on conditions of employment." (JtEx-21.3)

4e. The Regional Vice President of the Dallas Region, Sylvester Overturf, testified to the understanding of AFGE on delegations of authority. He testified that regional vice presidents are "to bargain on issues that d[o not] affect anything above the regional level." (TR. 88)

4f. The labor relations officer of the Dallas Region, Kenneth K.

King, testified to the understanding of SSA as to appropriate bargaining levels. It is as follows:

> My understanding always was that whatever level initiated it -- if the national level initiated it, the national level had the duty to bargain with the national component of AFGE. If the regional level initiated it, the regional level had the duty to give advance notice and negotiate as appropriate with the regional head of AFGE, who is Mr. Overturf over here. If the change takes place on the district level, it would be the responsibility of the district manager to give the District Union president or head of the Union advance notice and to negotiate as appropriate.

(TR 256)

5. Effective December 5, 1979, John Harris was appointed to the position of President of the National Council of Field Operations, and Sylvester Overturf to that of Regional Vice President of the Dallas Region of SSA. Martha McSteen is the Regional Commissioner of the Dallas Region, and Mr. Overturf's counterpart for union-management matters. The Dallas Region covers five States and manages over 33 district offices,[2] including the ones at El Paso and McAllen. At McAllen, Pablo Hernandez held the position of President of Local 3388 from 1977 up until March, 1981. At El Paso, Daniel Avila has been President of Local 2991 for two years.

6. In April 1980,[3] SSA and AFGE exchanged written proposals concerning a Master Labor Agreement, in preparation for impending negotiations. Those of the Union attempt to cover all areas subject to bargaining. Until such time as a Master Agreement is agreed to, the terms and conditions of all existing local AFGE agreements have been extended and are currently in effect. With regard to the instant cases, there are local collective bargaining agreements in effect in the McAllen and El Paso District Offices of SSA.

6a. Around April 7 or 8, AFGE submitted proposed Article 21, dealing with "Critical Elements" and "Performance Standards," two factors which the CSRA, in Section 203, requires each agency to develop for each job. Article 21 also covers such items as twice yearly performance interviews and their minimum content.

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[2] See TR 50, 156, 179, and 235 where witnesses gave varying statements as to the number of district offices in the Dallas Region, ranging from 33 to 80.

[3] All dates hereinafter mentioned will refer to 1980, unless otherwise specified.

6b. As of the time of the hearing on these cases, only a few articles of the Master Agreement had been agreed to "after probably a year or more of negotiations." (TR 248) Negotiations are now at the point of impasse.

7. On April 28, Regional Commissioner McSteen sent a letter to Regional Vice President Overturf, "as an official of AFGE." (JtEx-1) His comments and recommendations were solicited on a "draft PGS Supplement," compiled by going through existing chapters of the Personnel Guide for Supervisors (PGS), drawing together in one place all of the various areas that relate to accountability of employees, and providing examples of accountability plans for specific jobs. (JtEx-1) A copy of the draft was attached to the letter. A response by May 7 was sought.

7a. The draft PGS Guide (hereinafter, also referred to as the "Guide") applies only in the Dallas Region. Other regions have different accountability plans; and some regions have none.

7b. A primary purpose of the Guide is to set up "a means of documenting performance requirements and measuring actual performance, such documentation to "serve as a basis for annual employee appraisal and performance rating." (JtEx-2.3) It is also to provide a means for documenting adverse actions, awards, and the granting and denial of within-grade increases. Lack of such documentation has created "many of the documentation problems experienced in the past." (GCEx-3.2)

7c. The concept of employee accountability set out in the PGS Guide is not a new one in the Dallas Region, which has had a long-established policy of periodic performance discussions and performance evaluations, based on quality, quantity and timeliness of work, and the use of statistics for measuring performance. But until the advent of the Guide, there have been no written accountability plans with fixed numerical standards. The written plans are to cover the "major functions of each position" and set out the "expected level of satisfactory performance, and the methods to be used in measuring that performance." (JtEx-2.2) The Guide also covers such matters as twice yearly performance interviews and their minimum content, also covered by AFGE's proposed Article 21. See finding 6a, above.

7d. The Guide leaves to each district office the formulation of the actual plans and the insertion of numerical standards, in recognition of the fact that these are matters best left to local management, in view of local problems and circumstances. Not all jobs in the district offices are covered by the samples furnished by the Dallas Regional Office.

7e. The written plans were to cover the employee appraisal period from October 1980 through October 1981 (TR 48, 81) at which time the system mandated by the CSRA was to go into effect. The Guide refers to the CSRA, several times, and notes that "SSA centrally is in the process of developing a performance appraisal system for all employees," [that t]he system will include performance standards which will set out critical elements of each field position, "[and that i]t is not expected that the performance appraisal system will be implemented prior to October 1, 1981." (JtEx-2.5)

7f. Management officials in the Dallas Region expressed the view that the "only change" represented by the Guide was "to pull everything together, which is really not a change, and to require a written plan in each office so that each employee would know what those goals were and how they could contribute towards meeting those goals." (TR 254-255)

8. On May 4, Mr. Overturf responded to Commissioner McSteen's letter. He stated that: "It is the position of the AFGE/FO National Council that employee accountability and performance standards are matters subject to negotiations." (JtEx-3) Accordingly, he declined to accept the offer to make "comments." "At the instructions of the President, SSA/FO National," he made a request for negotiations over the matter. (JtEx-3)

9. Subsequently, Mr. Overturf and Mr. Harris got together about the draft Guide and decided that it was not feasible for them to get involved in negotiating on a subject that was involved in negotiations ongoing at the national level, "[b]ecause anything that [they] did or any issue involving negotiabiity, all this would be superceded by whatever occurred in the national contract." (TR 28-29)

10. Accordingly, on May 21, Mr. Overturf wrote another letter to Commissioner McSteen in which he explained "the National Counsel's position" as being that these were national issues, negotiations on them were underway, and that any regional plan would be only temporary, and probably not uniform with plans in other regions, or the plan eventually developed on a nationwide basis. (JtEx-4) He stated the "Council's position that implementation of the proposed regional plan for employee accountability and performance standards should be abandoned." (JtEx-4)

11. Shortly after receipt of the May 21 letter, Mr. King, the labor relations officer for the Dallas Region, called Mr. Overturf about it.

12. On July 23, Regional Commissioner McSteen informed Mr. Overturf that "the regional employee accountability guide [would] not be issued or implemented for the time being." (JtEx-6) This advice was relayed to Mr. Overturf in a letter concerning another matter.

13. Regional Commissioner McSteen disagreed with the Union position that performance standards would be set in the employee accountability plans. However, she was aware that the Authority was expected to be issuing a decision on the negotiability of performance standards, and decided it would be wise to await the decision before proceeding with the proposed Guide.

14. On July 31, the awaited decision was issued. See National Treasury Employees Union and Department of the Treasury, Bureau of Public Debt (hereinafter referred to as "Bureau of Public Debt"), 3 FLRA 769, No. 119, Case No. 0-NG-56 and also American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C. (hereinafter referred to as "OPM"), 3 FLRA 784, No. 120, Case Nos. 0-NG-177-2, 3, 4 and 5.

15. On August 13, Regional Commissioner McSteen sent a letter to Mr. Overturf which reads:

> On April 26, we asked you to comment on a draft PGS guide on accountability. On May 4, you responded that you would not comment since it was AFGE's position that accountability and performance standards were negotiable. On May 21, you further requested that we delay regional implementation of our accountability guide. We have honored your request up to this time.
>
> On July 31, the FLRA ruled on the negotiability of performance standards in cases numbered 0-NG-56 and 0-NG-177-2/5.
>
> This is to inform you that we now plan to issue and implement the accountability guide on September 2, 1980.
>
> We are providing a copy of the draft guide, which is unchanged from the one previously furnished.

(JtEx-7)

16. The Regional Commissioner expected the Union to make some proposals. After vainly waiting four or five days past the September 2 implementation date mentioned in her letter to Mr. Overturf, she put the Guide into the printing and distribution channels, which amounted to implementation.

17. The Guide went out to district offices with a letter instructing them to involve employees in the formulation of local accountability plans, to "consult" with local AFGE officials, in offices organized by AFGE, and to "bargain" with local NFFE officials, in offices organized by NFFE. (GCEx-3.1) It also instructed them that: "Since the guide is initiated by the Regional Office, the duty to bargain [at AFGE-organized offices] is between the Regional Commissioner and the Regional Vice President of AFGE. This obligation has been met." (GCEx-3.1)

18. The district offices were also instructed that the plans had to be approved by both the district manager and the area director.

19. On August 18 or 19, Mr. Overturf received the August 13 letter from Regional Commissioner McSteen. He was preparing to go to the national caucus of AFGE, which started August 24. He was unable to reach Mr. Harris about a response to the letter. Both Mr. Harris and Mr. Overturf went to the caucus before it started. Once there, the main concern of each was getting elected to office. They were unable, in the context of the caucus, which is a political function, to discuss a response to the August 13 letter. Mr. Overturf returned to his home on August 30 and to work, on September 2. On September 5, he consulted with Mr. Harris about a response; and they agreed to the content of one. Mr. Overturf testified that he did not feel it would have been "useful" to pick up the phone, and ask the agency for an extension for time to respond, "because we had to get something in writing." (TR 72)

20. On September 8, Mr Overturf responded, in writing, to the August 13 letter. He explained his delay in answering on the ground that he received the letter shortly before his scheduled departure to attend the AFGE national caucus, and that he had not seen a copy of the Authority decision at the time he received the letter. He objected that the Guide constituted changes in working conditions that were within the negotiating authority of the majority unit and which were still under negotiation at the majority-unit level. He explained that he interpreted Regional Commissioner McSteen's action to be a unilateral decision that the entire area of employee accountability and performance standards was non-negotiable, and that this was contrary to the Authority's decision, which held that decisions as to negotiability must be made concerning specific proposals. He stated that "it is the position of SSA/FO NC that the issuance of the Regional Supplement to PGS Chapter V, Guide 4 must be rescinded." (JtEx-8)

21. On September 24, Regional Commissioner McSteen replied to Mr. Overturf's September 8 letter. She advised him that had he had not requested negotiations or submitted counterproposals, after the notice contained in her August 13 letter; that they would have been considered; but that since none were received by September 2, the Guide had been implemented and would soon be in all offices.

22. On October 17, AFGE's Executive Vice President, National Council of SSA/FO Locals, filed the charge upon which the complaint in Case No. 6-CA-785 is based.

The McAllen District Office

23a. In the McAllen District Office, Pablo Hernandez, the President of AFGE's Local 3388, became aware of accountability plans for that office in October, when he was asked to attend a meeting with the Assistant District Manager, William H. Fitzgerald, for an explanation of the plans. Mr. Hernandez made an request to negotiate the implementation of the plans, at that time; and the request was rejected on the ground that the bargaining duty had been taken care of at the regional level. Mr. Fitzgerald did "discuss" with Mr. Hernandez the method of obtaining employee input (TR 191 and see also TR 186), and also told him there would be meetings with employees in each of the four modules in the office. The Union was given a "general invitation" to be "present" at the meetings, but was given no role to play. (TR 186) No notice was given to the Union, qua the Union, as to when the meetings would take place. The meetings started about mid-November and continued into December. Union representations were scattered throughout each module; and it was "common knowledge" as to when each module had its meeting. (TR 189)

23b. On November 1, the supervisor of Service Representatives sent each employee a note seeking "facts, not figures" as to what "items" of their job they felt should be looked at, to hold them accountable. (JtEx-14) He urged them to comment, and set a deadline of November 19. A sample plan of another district office was attached to the notes.

23c. On December 1, the McAllen District Manager sent a memorandum to all employee advising them of the formulation of the accountability plans and seeking their input, through their supervisors who "w[ould] be discussing your accountability plans with you." (JtEx-10.2) The Union was not consulted about the memorandum prior to issuance. The President of Local 3388 received a copy only "[a]s an employee." (TR 98)

23d. The Service Representatives were called together by management in early December. No Union representative attended the meeting. Management asked for their comments on the accountability plans. Some questions were asked by employees that could not be resolved. At a second meeting, "a week later on [their] regular weekly transmittal meeting to discuss any incoming material," the supervisor reminded the employees that there were some items left unanswered from the previous meeting and that he had "no definite reply." (TR 108) The Union was not represented at the second meeting.

23e. On December 2, the President of Local 3388 received a copy of a note from his supervisor which was addressed to all "Title 16, SSI" employees. (JtEx-11) He was such an employee. The note referred to copies of plans previously distributed and sought employee input by December 4.

23f. The meeting for the Title 16 SSI employees took place on December 4. Employees in the other modules also attended meetings about the plans.

23g. The plans were implemented at the McAllen District Office around January 1, 1981, without notice to Local 3388.

23h. Just two or three days after learning of the implementation, Local 3388, on January 29, 1981, requested negotiation over the implementation and adverse effects [which the plans might] have on members of the bargaining unit." (JtEx-12.1)

23i. On February 4, 1981, by memorandum to Local 3388, the Assistant District Manager declined the requested negotiations "at the local level." (JtEx-13.2) The reason given was that the PGS Guide was initiated by the Regional Commissioner and that "the only latitude given local management was the determination of local numerical objectives, not implementation of the plan itself." (JtEx-13.2) The memorandum explained that the duty to bargain was at the regional level, and had been met.

23j. Prior to the written accountability plan implemented on January 1, the McAllen District Office had used a very informal plan which varied from module to module. Statistics had always been used; but the written plan gave the supervisors "more figures to work with and the evaluations should be more accurate." (TR 184) The written plans eliminated "a lot of the subjectivity." (TR 185)

The El Paso District Office

24a. In the El Paso District Office, in August, Daniel M. Avila, the President of AFGE Local 2991, approached the Assistant District Manager, Francisco Martinez, to ask "what, if anything they were going to use as far as evaluating our performance for the latest performance appraisal period." (TR 111) Mr. Martinez indicated that "he wished to work with me on it as a representative of the Union, and he said that at that point in time he wished to come up with a mutually agreed plan." (TR 111-112)

24b. In September, the El Paso District Office received the Guide from the Dallas Regional Office and furnished a copy of it to Mr. Avila. In October, management held several meetings with Mr. Avila, to discuss the plans to be developed pursuant to the Guide.

24c. On October 31, Mr. Martinez approached Mr. Avila and indicated that there were going to be some unit meetings regarding the plans. Mr. Avila requested that Union observers be present, and designated certain representatives in each unit to be present as "Union observers, Union representatives." (TR 112-113) Management understood that the designated persons were to be at the meetings as Union "representatives." (TR 161, 162)

24d. The unit meetings began on November 4. Mr. Avila instructed the Union people he chose to attend the meetings of the dates and times of the meetings, and also that they were to give input only as employees, and not on behalf of the Union. The union designatees attended the meetings on "official time." (TR 139) It was the intent of Mr. Avila to negotiate at some future time.

24e. Rough drafts of accountability plans were passed out to employees at the meetings. Employees gave comments. Supervisors made notes. Suggestions were accepted from employees, including those attending on official time granted by management.

24f. On November 21, a labor-management meeting was held at the request of Mr. Avila. At the meeting Mr. Avila stated that an unfair labor practice charge had been filed by the National Council of SSA Field Office Locals against the Regional Commissioner for issuing "the Regional PGS instructions on accountabiity." (JtEx-15.1) He requested negotiation on the numbers plugged into the plans. The District Manager refused. She stated that they were not negotiable, and that she had been instructed "to secure employee input and that was it." (TR 116)

24g. At the November 21 meeting, Mr. Avila made it clear that he would not take a position as to the acceptability of any plan until the Area Director had acted on the drafts sent to him for review. Mr. Avila then requested a copy of the drafts sent to the Area Director, and recalled the District Manager replying that she saw no reason why she could not comply with this request. The District Manager testified that she gave him no answer, at the time. The District Manager seemed to be surer of her facts and was corroborated by another witness. Accordingly, I credit the testimony that no answer was given to Mr. Avila, at the November 21 meeting. Mr. Avila stated that he needed the drafts to determine "what the impact was going to be as far as what each specific position was going to be concerned with, as far as the issues involved for each one." (TR 117) He testified further that: "Before they went up to the Area Director I wanted to know how she specifically, or management specifically, felt as far as the accountability plans were concerned." (TR 117)

24h. On November 24, Mr. Avila sent the District Director a memorandum in which he made four proposals. All but one were adopted. The rejected one proposed the use of "median" performance, in the unit, as a basis for individual performance measurement. (Jt Ex-15.2 and see TR 199)

24i. On December 9, Mr. Avila made a written request for copies of the drafts to be sent to the Area Director. The drafts were being "assemble[d]," when this request was made. (TR 200)

24j. On December 16, shortly before the drafts of the plans were sent to the Area Director, the District Manager replied to Mr. Avila's request for copies of them. Her reply was that her drafts would not be complete until she received the comments of the Area Director. The requested drafts were never given to Local 2991.

24k. After the Area Director returned the draft plans, copies were made and given to Local 2991 and employees during the week of January 19. The major difference between the samples furnished with the Guide and the plans implemented was that a range of numbers were inserted into the formats furnished with the Guide. Where no formats were furnished, the El Paso office developed plans "from scratch." (TR 159)

24l. The collective bargaining agreement between Local 2991 and the El Paso District Office provides for "consultation and/or negotiation between the parties "on all personnel policies and practices or other matters affecting working conditions of employees in the Unit, which are within the discretion of the Employer ...." (TR. 123) This agreement was entered into on January 12, 1978, before the nationwide consolidated unit was recognized.

24m. The District Manager testified that "full consultation" with Local 2991 took place in regard to the plans, and that "maybe we negotiated some at the same time." (TR 206) Her labor-relations officer, however, admitted that no negotiations took place.

24n. While supervisors at the El Paso office had always used statistics in evaluating employee performance, before the implementation of the written accountability plans, they have begun to rely upon them "very heavily," since the implementation, and feel they have "less leeway" now in using their "judgment" and considering "extenuating circumstances." (TR 126, 147) Under the written plans, one supervisor has graded solely on the statistical aspect of performance and refused to consider the fact that one employee had spent time helping a blind employee develop his workload.

Discussion and Conclusions

A. On the alleged failure to engage in impact-and-implementation bargaining over changes in working conditions.

1. The parties do not dispute the accepted principle of Federal labor-relations law that an agency is required to give the exclusive representative prior notice and the opportunity to negotiate regarding substantial changes in working conditions that have an adverse impact upon bargaining-unit employees. See, e.g. Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region and Council of District Office Locals, American Federation of Government Employees, San Francisco Region, 5 FLRA No. 45 (1981). The dispute here begins, rather, with the question of whether any substantial changes in working conditions actually occurred when (1) the Dallas Regional Office of SSA issued, to the district offices of the region, a Personnel Guide, providing procedures and guidelines necessary to implement employee accountability plans; and (2) when the district offices implemented the plans they formulated, pursuant to the Guide. The preponderance of the evidence indicates that changes of substance did occur, in both situations, and that they had reasonably foreseeable adverse affects upon employees.

While there had long been a concept of employee accountability throughout the offices of the Dallas Region, there had never been any written or formal plans for measuring accountability, prior to the issuance of the Guide. Before the Guide, employees had been judged on a very informal basis that varied from office to office, and module to module. After the Guide, supervisors found themselves with less leeway to make subjective evaluations and to consider extenuating circumstances.

Another indicia of the substance of the change mandated by the Guide is the process required of the district offices in formulating their plans pursuant to it. It is a lengthy one, requiring input from employees, consultation with AFGE locals, bargaining with NFEE locals, and double review of the plans, by the district manager and the area director.

Another indicia is to be found in one of the purposes which the plans are to serve. Management in the Dallas Region had suffered many problems, in the past, from the absence of documentation to justify adverse actions, awards, and the granting and denial of within-grade increases. The written plans are to supply the missing documentation and correct this serious problem.

As for the plans formulated by the district offices pursuant to the regional guidelines, it was established that they were adapted by the district offices to local problems and circumstances, with discretion exercised as to the numerical standards used in measuring performance, and as to developing job formats "from scratch," when the office had unique positions not covered by samples furnished with the regional guidelines. (TR 159) Thus, a change of substance was created in each district office by the formulation of specific plans, pursuant to the Regional Office Guide.

2. The next disputed issue for resolution concerns the appropriate bargaining level when a newly-recognized, nationwide consolidated unit is negotiating a master agreement with an agency, and an activity proposes to change an existing condition of employment. Consideration of this question begins with the Authority's decision in Department of Health and Human Services, Social Security Administration and Local 1346, American Federation of Government Employees, AFL-CIO, 6 FLRA 202, No. 33 (June 25, 1981), (hereinafter, "Local 1346") which both parties cite in their briefs. See GCBr 11-12 and RBr 11 and 34. Local 1346 involves the same agency and the same consolidated AFGE unit as the instant proceeding. Local 1346 had an agreement which preceded the certification of the nationwide consolidated unit; and Local 1346 sought to renegotiate up to a third of its articles while negotiations at the national level were in progress. The issue resolved by the Authority was "whether, following the certification of AFGE for a nationwide consolidated unit, there remained a duty to bargain new conditions of employment at the local level pursuant to the reopener clause contained in the local agreement." (6 FLRA at 203, emphasis by the Authority). The Authority ruled that no

such duty remained, and that a "requirement that substantive bargaining pursuant to a reopener must take place with respect to a portion of a newly consolidated unit would be antithetical to the goal of stability and to the purpose of consolidation." 6 FLRA at 204. A caveat to the Authority's decision was expressed as follows: "This is not to say that there exists any impediment to the parties at the level of exclusive recognition agreeing to authorize supplemental negotiations at a sub-level." (6 FLRA at 204, fn. 2)

Both the rationale and the caveat of the Local 1346 decision apply here. AFGE is conducting national negotiations on an employee appraisal system. Albeit different in some respects from what is on the national bargaining table, the regional guidelines for accountability plans, and the district offices plans themselves, are also concerned with what amounts to an employee appraisal system. The Guide and the plans are "new", in some significant respects, as already discussed. Other regional offices have different plans in place; some regional offices have none. Clearly, the "appropriate unit" for bargaining under the Local 1346 rationale, is at national level. See Section 7103(a)(12) of the Statute, cited in Local 1346, 6 FLRA at 203.

However, the parties here have just as clearly recognized sub-level negotiations. Shortly after recognition of the nationwide consolidated unit, the parties agreed that regional bargaining is to take place where the region initiates a change, and it has no effect beyond the region. They are also in agreement that when a management change takes place, at the district level, it is the responsibility of the local union-management team to negotiate, at least where there is a local agreement in effect, as is the case at the El Paso and McAllen offices.

3. The remaining issues to be resolved are whether there were failures to bargain in good faith by the Dallas Regional Office and the El Paso and McAllen District Offices. In view of the conclusions above discussed, and the facts established by the record, it must be concluded that failures to bargain in good faith, as to the plans, but not as to the Guide, did occur at each establishment.

At the Dallas Region level, in Case No. 6-CA-785

The evidence of record shows that management in the Dallas Regional Office gave a 20-day notice to AFGE's Regional Vice President for the Dallas Region of its intent to implement the Guide; that it waited about 24 days after giving the notice and before implementing the Guide; and that no request to bargain was received during this period. No failure to bargain in good faith can be found, on these facts.

Nevertheless, the General Counsel charges bad faith in implementing the Guide. One argument is that the letter giving notice amounted to announcing a "fait accompli," and thereby excused the Union from giving a timely response. (GCBr 16) This is not a fair reading of the letter, however. The letter referred to a prior request of the Union to negotiate performance standards, and cited the Authority's recent decisions on the negotiability of performance standards. Had the Union studied these decisions within the 20-day notice period, it would have found that they held "significant aspects of performance appraisal systems may be negotiated." See Bureau of Public Debt, 6 FLRA at 675 and also page 777 referring to the fact that management must "negotiate on procedures and appropriate arrangements with respect to employees adversely affected by management's exercise of its right." See also the OPM decision, 6 FLRA at 789, which was also cited in the letter. Reference to the request of AFGE to negotiate, and citation of these decisions was a clear indication that management expected to negotiate on these matters.

Another alleged act of bad faith is that the Dallas Regional Office did not contact John Harris, the President of the National Council, after Sylvester Overturf, the Regional Vice President, made requests to elevate the matter to the national level. See GCBr 16. This allegation fails because the record established that Mr. Sylvester was the chief representative of the National Council, in the Dallas Region, and the Union representative delegated to receive timely notice of changes. He also spoke for the National Council in his correspondence with regional management. Therefore, contact by management with Mr. Overturf was tantamount to contact with the National Council.

The General Counsel also charges bad faith in that the Dallas Regional Office did not communicate to Mr. Overturf its position on elevating the issue to the national level. See GCBr 16. Undoubtedly communications between the parties could have been better, from both directions. But the sparsity on management's part does not rise to the level of an unfair labor practice. Management was, after all, uncertain as to what was bargainable, at any level, until the Authority issued its decisions in the OPM and Bureau of the Public Debt cases. Its decision to await the outcome of these cases before communicating its views to Mr. Overturf was reasonable, and not an act of bad faith. Within a reasonable time after issuance of the decisions, the Dallas Region got in touch with Mr. Overturf, to start the bargaining process. See findings 14 and 15, above.

While no failure to bargain in good faith, as to the Guide, can be found, the Dallas Regional Office did, in effect, refuse to bargain over the impact and implementation of the plans formulated by the district offices. It did so by instructing its district offices not to engage in such bargaining. It did this in the mistaken belief, already discussed, that the plans did not constitute changes of substance in working conditions, and that regional-level bargaining over the Guide was the extent of the bargaining obligation. The Dallas Region, therefore, bears the responsibility for the failure to bargain, at the district-office level.

It is appropriate, at this point, to discuss SSA's objection that a requirement to bargain at both the regional and district office level is excessive. See RBr 33-34. To the contrary, it simply allows accommodation for the local problems and circumstances recognized by the Dallas Region in allowing district offices to develop their own plans. For example, bargaining by the El Paso District Office would have given Local 2991 the opportunity to alleviate adverse effects suffered by employees who took time to assist the blind employee assigned to that office. This is not to say that the district offices may countermand agreements reached at the regional level; but they may refine them to accommodate these types of local problems.

At the El Paso and McAllen District Office level

SSA does not contest the allegation that no bargaining took place at the McAllen District Office. Clearly, it did not.

At El Paso, SSA does argue that bargaining, in fact, took place. The El Paso District Manager, however, was under orders not to bargain; told the President of Local 2991 that she only had to obtain employee input; and expressed doubt that full bargaining took place. Her labor-relations officer conceded that it did not. There could hardly have been "good faith" bargaining, as required by the Statute, under those circumstances. See Section 7103(a)(12) and 7114(b)(1)-(3).

Accordingly, it must be concluded that there was a failure to bargain in good faith by the Dallas Region and the El Paso and McAllen District Offices, in violation of Sections 7116(a)(1) and (5) of the Statute.

B. The charge of a bypass of Local 2991 at the El Paso District Office.

The General Counsel argues that "by refusing to bargain with Local 2991 and by directly soliciting from unit employees their opinions and suggestions regarding working conditions, the El Paso District Office bypassed the local agent of the exclusive representative" (GCBr 21), thereby engaging in an unfair labor practice, in violation of Sections 7116(a)(1) and (5) of the Statute.

It has already been concluded that the El Paso District Office refused to bargain with Local 2991; and such refusal does amount to an illegal bypass of the exclusive bargaining representative, under Federal labor-relations law.

However, no illegal bypass can be found from the further allegation, found in Count 8 of the Complaint, which concerns the meetings called by supervisors to get employee input on the plans. Management give Local 2991 notice of these meetings; acquiesced in union representatives being present, on official time; gave Local 2991 the dates and places of the meetings; and had reasonable cause to believe that the employees designated by the Union to be present were there as representatives. Count 8 of the Complaint in Case Nos. 6-CA-1053, 1053-1, 1054, and 1055 should be dismissed.

C. The charge of a bypass of Local 3388 and conducting a Section 7114(a)(2)(A) "formal discussion[s]" without affording Local 3388 an opportunity to be present, at the McAllen District Office.

The discussions at issue are those called by management to get employee input into the formulation of accountability plans. With one possible exception, they were clearly "formal discussions" within the meaning of Section 7114(a)(2)(A), in that they were called by management, had a prearranged agenda, concerned a subject within the scope of collective bargaining, were called for the purpose of getting employees' ideas on the formulation of the plans, and employee participated in the discussions. The possible exception is the second meeting which took place with Service Representatives. The evidence shows only that it was a regular weekly meeting to discuss incoming material of some unspecified sort, and the supervisor merely alluded to the fact that he had no definite reply to questions raised at the first meeting, on the accountability plans.

While management extended to Local 3388 a "general invitation" to attend the meetings, it did not advise the Local of the actual dates and times of the meetings. Such information came to Local officials only incidentally, in their capacity as employees. This conduct falls short of treating a union as a "partner[s] on an equal footing," the standard set by this Authority in United States Air Force, Air Force Logistics Command, Aerospace Guidance and Metrology Center, Newark, Ohio and Local 2221, and American Federation of Government Employees, AFL-CIO, 4 FLRA No. 70 (1980). See also Norfolk Naval Shipyard, Portsmouth Virginia and Tidewater Virginia Federal Employees Metal Trades Council, 6 FLRA 74, No. 22 (1981), finding a violation of Sections 7116(a))1) and (8) when a meeting was held with employees without notice to the union, and union officials just happened to be present, in their capacity as employees, not as union representatives. The Authority stated:

> More specifically, section 7114(a)(2)(A) requires that a Union "be given the opportunity to be represented during formal discussions involving conditions of employment." This clearly contemplates prior notice to the Union so that, inter alia, the Union will have an opportunity to select representatives of its own choosing to be present.

See 6 FLRA at 76, emphasis by the Authority.

Thus, the series of meetings held with employees on the accountability plans, without providing Local 3388 specific notice of each one and an opportunity to be present, constituted illegal bypasses of the Union and also a violation of Section 7114(a)(2)(A). These are unfair labor practices, under Sections 7116(a)(1), (5), and (8) of the Statute.

In addition, management at the McAllen District Office illegally bypassed Local 3388 when it sent bargaining-unit employees memoranda exhorting them to give comments on the accountability plans. This constitutes a failure to bargain through representatives chosen by employees and is an unfair labor practice under Sections 7116(a)(1) and (5). As this Authority held in its Bureau of Public Debt decision, an agency's right to establish performance standards "is subject to certain rights of a labor organization under the Statute," including "[t]he duty to bargain ... [on] the form of employee participation in the establishment of performance standards ...." 6 FLRA at 770.

D. The charge of management's refusal to furnish allegedly necessary information at the El Paso District Office.

Section 7114(b)(4) of the Statute imposes a duty upon an agency to furnish "data" which is "normally maintained by the agency in the regular course of business," and which is "reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining."

The data sought by Local 2991 consists of drafts of plans formulated by the El Paso District Office and sent to the Area Director for review. The drafts were not final until after the review. The President of Local 2991 advised the District Manager that the Local would not take a position as to the acceptability of any plan, until the Area Director had acted on the drafts sent to him. He said he wanted to see the drafts so that he could determine what their "impact" was going to be, and what management "felt" above them before the plans went to the Area Director. See finding 24(g) above. Local 2991 received copies of the plans after they were reviewed by the Area Director, and seven days before they became effective. See finding 24k, above.

On these facts, it cannot be concluded that the drafts were "necessary," within the meaning of the Statute. Local 2991 could learn nothing significant about "impact" from a draft that was subject to change. In recognition of this the President of Local declined to take any position until he saw the final plans. What management "felt" about the plans before they were reviewed by the Area Director would seem to have little practicable value to Local 2991, and might lead to diversionary discussions over the content of them, which is not within the scope of the bargaining obligation, under this Authority's Bureau of Public Debt and OPM decisions. In any event, it cannot be concluded that what management "felt" about the plans before they become final was "necessary" to collective bargaining over their impact and implementation.

Nor can it be concluded that drafts of final papers are the type of data "normally maintained in the regular course of business." Normally, drafts such as these requested would not be kept, for they serve no purpose.

Accordingly, Count 10 of the Complaint in Case No. 6-CA-1053, 1053-1, 1054, and 1055 should be dismissed.

Other issues are raised by the parties. However, resolution of them would only serve to extend, without altering this decision and the remedy to be recommended.

Ultimate Findings and Orders

A. In Case No. 6-CA-785, the General Counsel has established, by a preponderance of the evidence, that violations of Sections 7116(a)(1) and (5) have occurred in the Dallas Region of the Social Security Administration.

Accordingly, it is ORDERED, in Case No. 6-CA-785, pursuant to Section 7118(a)(7)(A) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §7118(a)(7)(A) (Supp. III, 1979), and Section 2423.29(b)(1) of the Rules and Regulations of the Federal Labor Relations Authority, 45 Fed. Reg. 3511 §2423.29(b)(1), that the Dallas Region of the Social Security Administration, Dallas, Texas:

1. Cease and desist from:

    (a) Advising offices organized by the American Federation of Government Employees (AFGE) prior to August 30, 1979, that the obligation to bargain with AFGE over the employee accountability plans formulated by these offices, pursuant to the Personnel Guide for Supervisors distributed regionally in September 1980, is only at the regional level.

    (b) In any like or related manner, violating Sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action:

    (a) Instruct the El Paso and McAllen District Offices to withdraw all employee accountability plans formulated pursuant to the Personnel Guide for Supervisors distributed by the Dallas Region in September 1980, destroy all documentation prepared pursuant to those plans, and make whole any employee adversely affected by the plans consistent with applicable laws and regulations.

(b) Instruct the El Paso and McAllen District Offices to give notice to Local 3388 or 2991 of the American Federation of Government Employees, as appropriate, of any employee accountability plans proposed for implementation, and extend to the appropriate Local an opportunity to engage in appropriate bargaining prior to implementing such plans.

(c) Notify all the recipients of General Counsel's Exhibit 3 that the third paragraph is to be deleted, and that the first sentence of the fourth paragraph is to be modified to read as follows: "Managers of AFGE and NFFE offices have an obligation to negotiate, if requested, on the manner in which the local accountability plan will be developed and implemented."

(d) Post at the Dallas, Texas, Regional Office copies of the attached notice marked "Appendix A," on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Regional Commissioner and posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material; and

(e) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

B. In Case No. 6-CA-1034, the General Counsel has established, by a preponderance of the evidence, that violations of Sections 7116(a)(1), (5), and (8) occurred at the McAllen District Office.

Accordingly, it is ORDERED, in Case No. 6-CA-1034, pursuant to the authority cited in part A, above, that the McAllen District Office of the Social Security Administration, McAllen, Texas:

1. Cease and desist from:

(a) Bypassing Local 3388 and dealing directly with employees concerning accountability plans.

(b) Conducting formal discussions, as defined in 5 U.S.C. 7114(a)(2)(A), without timely and full notice to Local 3388 and an opportunity to be present.

(c) Establishing accountability plans without affording the Union a prior opportunity to negotiate over bargainable aspects of the plans.

(d) In any like or related manner, violating Sections 7116(a)(1), (5), and (8) of the Federal Service LaborManagement Relations Statute.

2. Take the following affirmative action:

(a) Withdraw all accountability plans formulated pursuant to the Personnel Guide for Supervisors distributed by the Dallas Regional Office in September 1980.

(b) Destroy all documentation prepared pursuant to such accountability plans.

(c) Make whole any employee adversely affected by such accountability plans consistent with applicable law and regulations.

(d) Upon request, negotiate with Local 3388 over bargainable aspects of employee accountability plans, prior to implementation.

(e) Provide Local 3388 with full and timely information, including dates and times, of any formal discussions to be conducted with employees and invite it to send a representative to such discussions.

(f) Post, at the McAllen, Texas, District Office, copies of the attached notice marked "Appendix B," on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the District Manager and posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material; and

(g) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

C. In Case Nos. 6-CA-1053, 1053-1, 1054, and 1055, the General Counsel has established, by a preponderance of the evidence, that violations of Sections 7116(a)(1) and (5) have occurred at the El Paso District Office, as alleged in Counts 9(a) and 11 of the Complaint. The violations alleged in Counts 8 and 10 were not sustained.

Accordingly, it is ORDERED, in Case Nos. 6-CA-1053, 1053-1, 1054, and 1055, pursuant to the authority cited in part A, above, that Counts 8 and 10 of the Complaint be dismissed and that the El Paso District office of the Social Security Administration, El Paso, Texas:

1. Cease and desist from:

   (a) Bypassing Local 2991 by refusing to negotiate with it, in good faith, over the bargainable aspects of employer accountability plans, prior to their implementation.

   (b) In any like or related manner, violating Section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action:

   (a) Withdraw all accountability plans formulated pursuant to the Personnel Guide for Supervisors distributed by the Dallas Regional Office in September 1980.

   (b) Destroy all documentation prepared pursuant to such accountability plans.

   (c) Make whole any employee adversely affected by such accountability plans consistent with applicable law and regulations.

   (d) Upon request, negotiate with Local 2991 over bargainable aspects of employee accountability plans, prior to implementation.

   (e) Post, at the El Paso District Office, copies of the attached notice marked "Appendix C," on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the District Manager and posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices are customarily posted.

Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material; and

(f) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Isabelle R. Cappello

ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: February 11, 1982
Washington, D.C.

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We Hereby Notify Our Employees That:

WE WILL instruct the El Paso and McAllen District Offices to withdraw all employee accountability plans formulated pursuant to the Personnel Guide for Supervisors distributed by them in September 1980, destroy all documentation prepared pursuant to those plans, and make whole any employees adversely affected by those plans consistent with applicable law and regulations.

WE WILL instruct the El Paso and McAllen District Offices to give notice to Local 2991 or 3388 of the American Federation of Government Employees (AFGE), as appropriate, of any employee accountability plan proposed for implementation, and extend to the appropriate local an opportunity to negotiate over bargainable aspects of the plans, prior to their implementation.

WE WILL correct the memorandum of September 24, 1980, to all area directors, district managers, branch managers, and teleservice center managers, concerning the Regional Supplement to PGS Chapter V, Guide 4, to reflect that managers of offices organized by AFGE have an obligation to bargain, if requested, on the bargainable aspects of local accountability plans.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 6, whose address is P.O. Box 2640, Dallas, TX, 75221 and telephone number is (214) 767-4996.

APPENDIX B

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATED CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We Hereby Notify Our Employees That:

WE WILL NOT bypass Local 3388 and deal directly with employees.

WE WILL provide Local 3388 with timely and full notice of any formal discussions to be held with bargaining-unit employees and an opportunity to be present.

WE WILL provide Local 3388 with an opportunity to negotiate the bargainable aspects of any employee accountability plans, before implementation.

WE WILL withdraw all accountability plans formulated pursuant to the Personnel Guide for Supervisors distributed by the Dallas Regional Office in September 1980.

WE WILL destroy all documentation prepared pursuant to such accountability plans.

WE WILL make whole any employee adversely affected by such accountability plans consistent with applicable law and regulations.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice of compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 6, whose address is P.O. Box 2640, Dallas, TX, 75221 and telephone number is (214) 767-4996.

APPENDIX C

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We Hereby Notify Our Employees That:

WE WILL NOT bypass Local 2991 by refusing to negotiate with it over the bargainable aspects of employee accountability plans, prior to their implementation.

WE WILL provide Local 2991 with an opportunity to negotiate bargainable aspects of employee accountability plans, before implementation.

WE WILL withdraw all accountability plans formulated pursuant to the Personnel Guide for Supervisors distributed by the Dallas Regional Office in September 1980.

WE WILL destroy all documentation prepared pursuant to such accountability plans.

WE WILL make whole any employee adversely affected by such accountability plans consistent with applicable law and regulations.

____
(Agency or Activity)

Dated: ____________________ By: ________________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice of compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 6, whose address is P.O. Box 2640, Dallas, TX 75221 and telephone number is (214) 767-4996.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE ARMY
FORT GREELY, ALASKA

and

DEPARTMENT OF THE ARMY
172d INFANTRY BRIGADE (ALASKA)
FORT RICHARDSON, ALASKA

and

DEPARTMENT OF THE ARMY
HEADQUARTERS, U.S. ARMY FORCES COMMAND
FORT McPHERSON, GEORGIA

and

DEPARTMENT OF THE ARMY
THE PENTAGON, WASHINGTON, D.C.

Respondents

and

Case No. 9-CA-1204

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1949, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority, in accordance with section 2429.1(a) of the Authority's Rules and Regulations, based on a stipulation of facts by the parties, who have agreed that no material issue of fact exists. The Respondents and the General Counsel have filed briefs for the Authority's consideration.

The second amended complaint alleges that the Respondents, Department of the Army, Fort Greely, Alaska (Ft. Greely); Department of the Army, 172d Infantry Brigade (Alaska), Fort Richardson, Alaska (Brigade); Department of the Army, Headquarters, U.S. Army Forces Command, Fort McPherson, Georgia (FORSCOM); and Department of the Army, Washington, D.C. (Headquarters), violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) when commissary and post exchange privileges were unilaterally terminated effective September 1, 1981, for Ft. Greely civilian employees not residing on the installation, without providing the American Federation of Government Employees, Local 1949, AFL-CIO (the Union) with notice and an opportunity to bargain over the change in working conditions.

II. Background

The record indicates that Respondents Ft. Greely, Brigade, and FORSCOM, respectively, report upward in the Army chain of command to Respondent Headquarters. The Union is the exclusive representative of a bargaining unit which includes all general schedule (GS) and wage grade (WG) employees at Ft. Greely. The Union and Respondent Brigade have been parties to a collective bargaining agreement covering the bargaining unit at all times material herein.

Bargaining unit civilian employees at Ft. Greely have not resided on the installation since the early 1970's. Both GS and WG employees had received exchange privileges since the mid-1950's, and GS employees have had commissary privileges since December 1975. As the Commander of Ft. Greely stated in a letter to Respondent Brigade in November 1979 requesting a continuation of commissary and exchange privileges for civilian employees at Ft. Greely:

> On-Post privileges have been a historical part of the Fort Greely civilian workforce relationship. In the past, tenant and garrison supervisors have routinely used the availability of privileges to encourage local and out-of-state civilians to accept employment at this geographically isolated location. We have always experienced extreme difficulty filling our authorized

civilian positions and loss of privileges would have significant impact on present and future hiring and morale. The granting of civilian privileges at Fort Greely is one of the few incentives available to the Command to reduce the cultural-economic shock for career employees moving into the Delta Junction-Fort Greely area.

By letter dated November 7, 1980, Respondent Ft. Greely again wrote to Respondent Brigade regarding the continuation of commissary and exchange privileges for civilian employees at Ft. Greely. The letter indicated that the basic reasons for granting such privileges still existed, but that there had been improvements in those areas. Ft. Greely recommended that the civilian privileges should be continued on an interim basis, and that Brigade should undertake a comprehensive study of the need to continue authorizing such privileges. Respondent Brigade's response indicated that a study of civilian commissary and exchange privileges at Ft. Greely would be undertaken, and that such privileges would be extended through June 30, 1981. Brigade conducted the study during April and May 1981. The Union was not notified, consulted or given an opportunity to negotiate about any aspect of this study.

By letter dated June 6, 1981, Brigade directed Ft. Greely to withdraw commissary and post exchange privileges from all civilian employees at Ft. Greely on September 1, 1981, based upon the results of its study. Brigade's labor relations specialist gave a copy of the June 6 letter to the Union's president on June 17, indicating that the decision to withdraw privileges was nonnegotiable but that management would negotiate "impact and implementation."

On August 3, 1981, the Union sent Brigade a request to bargain over the withdrawal of civilian privileges at Ft. Greely, stating that its position regarding the privileges was to maintain the status quo. In its response, Brigade agreed to negotiate over the impact and procedures regarding the withdrawal of privileges. On August 26, the Union met with representatives of Brigade and Ft. Greely to negotiate concerning the withdrawal of civilian privileges. The Union sought to retain the privileges; Ft. Greely stated that, based on higher level guidance from Respondents FORSCOM and Headquarters, the decision to withdraw the privileges was nonnegotiable and that the privileges would be withdrawn on September 1, 1981. By letter to the Union dated August 28, 1981, Ft. Greely confirmed management's oral statements of August 26 that the decision to withdraw privileges was nonnegotiable. Specifically, the letter stated that Army regulations (AR 60-20 and 30-19) precluded negotiations over the substance of the decision to discontinue commissary and exchange privileges, and also that the Union had inordinately delayed its request to negotiate. The letter also reiterated that the privileges would be withdrawn on September 1. The privileges were in fact withdrawn on that date.

III. Positions of the Parties

A. The Respondents

1. Commissary store privileges

The Respondents contend that Department of Defense (DOD) Directive 1330.17 (1978)--which sets forth policies for the extension of commissary store privileges--provides that such privileges will not be extended to civilian employees of the military services who do not reside within the military installations; that deviations from this requirement are permitted only in cases of emergency and only until the emergency is terminated; that while civilian employees at Ft. Greely had received commissary privileges from 1975 to 1981 even though they did not reside on the installation, such action was taken with Headquarters approval; and that the decision to extend commissary privileges to these employees was reviewed by Headquarters on an annual basis.

2. Exchange privileges

The Respondents contend that there were no restrictions on granting exchange privileges to civilian employees prior to July 8, 1980, when DOD Directive 1330.9--which sets forth policies for the extension of exchange privileges--was promulgated, and that Respondent Brigade therefore acted within its discretion in affording such privileges to civilian employees at Ft. Greely since the 1950's at Ft. Greely's request. However, the Respondents assert that DOD

Directive 1330.9 superseded Army regulations (AR 60-20) which had authorized local commanders to grant exchange privileges to civilian employees when determined to be in the best interest of their command's mission; removed the authority of Brigade and Ft. Greely to grant such privileges; and limited their discretion solely to requesting deviations through channels to Headquarters where necessary to alleviate personal hardships. Since Brigade concluded on the basis of its study that no personal hardships existed at Ft. Greely which would justify a continued deviation, the Respondents assert that the privileges were properly withdrawn.

3. The duty to bargain over the withdrawal of privileges

The Respondents further contend that the duty to bargain does not extend to matters which are the subject of a regulation issued by an agency (DOD) or a primary national subdivision (Headquarters) unless the Authority has determined under section 7117(b) of the Statute that no compelling need exists for the regulation or unless exclusive recognition exists at the agency or primary national subdivision level. Since neither exception applies here, the Respondents argue that there was no duty to bargain concerning the decision to withdraw commissary and exchange privileges but only a duty to bargain over the impact and implementation of that decision--an offer which the Union rejected.

B. The General Counsel

The General Counsel contends that Brigade and Ft. Greely were acting as agents of FORSCOM and Headquarters when Brigade ordered the withdrawal of commissary and exchange privileges from civilian employees at Ft. Greely and Ft. Greely implemented that order. The General Counsel maintains that these actions resulted in a unilateral change in conditions of employment without negotiating with the Union concerning the decision to make the change and therefore violated section 7116(a)(1) and (5) of the Statute. The General Counsel argues that commissary and exchange privileges are conditions of employment under section 7103(a)(14) of the Statute and past practice; that DOD regulations do not preclude negotiations at the local level concerning such matters; and that even if a conflict exists between DOD's regulations and the Union's proposal to continue the practice concerning commissary and exchange privileges, the Respondents failed to demonstrate a compelling need for the regulations.

The General Counsel further contends that a status quo ante remedy is appropriate to cure the Respondents' unlawful conduct in this case because management failed and refused to meet the statutory duty to bargain over the decision to change negotiable conditions of employment. As requested by the General Counsel, the remedy would require restoration of the privileges to unit employees at Ft. Greely and their reimbursement for any monetary losses suffered as a result of the unilateral revocation of commissary and exchange privileges.

IV. Analysis

A. The Withdrawal of Commissary and Exchange Privileges from Unit Employees at Ft. Greely Affected their Conditions of Employment under Section 7103(a)(14) of the Statute

The Respondents concede, and we find, that the withdrawal of commissary and exchange privileges from the unit employees at Ft. Greely affected their conditions of employment within the meaning of section 7103(a)(14) of the Statute. In our recent decision, Antilles Consolidated Education Association and Antilles Consolidated School System, 22 FLRA No. 23 (1986), we described two basic considerations in deciding whether a matter involves a condition of employment of bargaining unit employees: (1) whether the matter proposed to be bargained pertains to bargaining unit employees; and (2) the nature and extent of the effect of the matter proposed to be bargained on working conditions of those employees. As to the second consideration, there must be a direct connection between the proposal and the work situation or employment relationship of bargaining unit employees.

Applying the Antilles analysis to the matters at issue in this case, it is clear that the first consideration is satisfied. The Union sought negotiations on the decision to withdraw existing privileges from employees it represents in a unit of exclusive recognition.

With respect to the second consideration, we conclude that the General Counsel established a direct connection between the practice of granting commissary and exchange privileges to unit employees at Ft. Greely and their work situation or employment relationship. The stipulated record in this case shows, as in Department of the Air Force, Eielson Air Force Base, Alaska, 23 FLRA No. 83 (1986), which also involved the withdrawal of similar privileges from civilian employees in Alaska, that the privileges had been continued for a long period of time as part of the Ft. Greely civilian workforce relationship; were routinely used to encourage civilians to accept employment at that geographically isolated location; and constituted one of the few incentives to ease the extreme difficulty in filling authorized civilian positions and to improve morale. On this basis, we conclude that the matter of withdrawing commissary and exchange privileges from unit employees at Ft. Greely concerns conditions of employment under section 7103(a)(14) of the Statute. See also Department of the Army, Dugway Proving Ground, Dugway, Utah, 23 FLRA No. 80 (1986); U.S. Department of Justice, U.S. Immigration and Naturalization Service, 14 FLRA 578 (1984).

B. Respondent Brigade Had a Duty to Bargain with the Union Concerning the Decision to Withdraw the Privileges

It is well-established that an agency has a duty under the Statute to negotiate with an exclusive representative of an appropriate unit of its employees at the level of exclusive recognition concerning conditions of employment affecting them, except as provided otherwise by Federal law, Government-wide rule or regulation, or agency regulations for which a compelling need exists. Headquarters, Defense Logistics Agency, Washington, D.C., 22 FLRA No. 93 (1986); Defense Contract Administration Services Region, Boston, Massachusetts, 15 FLRA 750 (1984). Since there is neither a bargaining relationship between the Union and either Respondents Headquarters or FORSCOM nor evidence that either Headquarters or FORSCOM interfered with the fulfillment of the bargaining obligation between Respondent Brigade and the Union, we conclude that the complaint must be dismissed as to Respondents Headquarters and FORSCOM. See Boston District Recruiting Command, Boston, Massachusetts, 15 FLRA 720 (1984).

Since we have concluded that the withdrawal of commissary and exchange privileges from unit employees at Ft. Greely concerns conditions of employment, it follows that Respondent Brigade had a duty to bargain over its decision to do so except as provided by Federal law, Government-wide rule or regulation, or agency regulations for which a compelling need exists. There is no contention that the Union's proposal to maintain the privileges in question is inconsistent with any Federal law or Government-wide regulation.

With respect to internal agency regulations issued at the DOD or Headquarters level, the Respondents contend essentially that such regulations have not delegated control over the subject matter to management officials at the level of bargaining but have retained such authority at higher levels of the agency. As we have previously held, however, an agency may not foreclose bargaining on an otherwise negotiable matter because authority has not been delegated to the level of exclusive recognition. See, for example, the Antilles case cited above and Overseas Education Association, Inc. and Department of Defense, Office of Dependents Schools, 22 FLRA No. 34 (1986) (Union Proposal 5), petition for review filed, Overseas Education Association v. FLRA, No. 86-1491 (D.C. Cir. Sept. 3, 1986). Under section 7114(b)(2) of the Statute, an agency is obligated to provide representatives at the level of bargaining who are authorized to negotiate and enter into agreements on all matters within the scope of bargaining, and this statutory obligation cannot be obviated by an agency's internal regulations. See the Eielson case cited above and American Federation of Government Employees, AFL-CIO, Local 1409 and U.S. Army Adjutant General Publications Center, Baltimore, Maryland, 18 FLRA No. 68 (1985).

The Respondents' argument that there was no duty to bargain over commissary and exchange privileges because such matters are the subject of internal agency regulations and the Authority has not determined under section 7117(b) of the Statute that no compelling need exists for those regulations is also misplaced. As we recently held under almost identical circumstances in Eielson, this argument is inapposite when the basis of the agency's argument concerns the delegation of authority rather than compelling need within the meaning of section 7117. Even assuming that the argument were relevant, the Respondents' position is inconsistent with established Authority precedent. In Defense Logistics Agency (Cameron Station, Virginia), 12 FLRA 412 (1983), affirmed sub nom. Defense Logistics Agency v. FLRA, 754 F.2d 1003 (D.C. Cir. 1985), the Authority held that compelling need determinations may appropriately be decided in an unfair labor practice proceeding. We reaffirmed this conclusion with further reasoning in Aberdeen Proving Ground, Department of the Army, 21 FLRA No. 100 (1986), petition for review filed, Aberdeen Proving Ground, Department of the Army v. FLRA, No. 86-2577 (4th Cir. June 26, 1986). But see United States Army Engineer Center v. FLRA, 762 F.2d 409 (4th Cir. 1985), reversing U.S. Army Engineer Center and Fort Belvoir, 13 FLRA 707 (1984).

C. Respondent Brigade Failed to Fulfill Its Duty to Bargain

It is undisputed that Respondent Brigade directed Ft. Greely to withdraw commissary and exchange privileges from unit employees at Ft. Greely and that such privileges were withdrawn on September 1, 1981. While Respondent Brigade gave the Union prior notice of its decision to withdraw the privileges in question, it consistently rejected the Union's request to negotiate over that decision. Although Ft. Greely also refused to negotiate on the basis that it lacked authority, and actually implemented the withdrawal of privileges, we conclude that Ft. Greely was acting in a representative capacity for Respondent Brigade and that Ft. Greely's conduct is attributable to Respondent Brigade. See Boston District Recruiting Command, Boston, Massachusetts, 15 FLRA 720, 724 (1984). Accordingly, we shall dismiss the complaint as to Respondent Ft. Greely but conclude that Respondent Brigade violated section 7116(a)(1) and (5) of the Statute by unilaterally changing negotiable conditions of employment as alleged in the complaint.

V. Remedy

The Authority has previously determined that where management has made a unilateral change in a negotiable term and condition of employment, effectuation of the purposes and policies of the Statute requires imposition of status quo ante remedies, absent special circumstances, in order not to render meaningless the mutual obligation to negotiate. Veterans Administration, West Los Angeles Medical Center, Los Angeles, California, 23 FLRA No. 37 (1986) (n.3 and accompanying text). As the Respondents have neither alleged nor established that special circumstances exist so as to negate the imposition of such a remedy in this case, we conclude that a status quo ante remedy is warranted. Accordingly, Respondent Brigade shall be ordered to reinstate the commissary and exchange privileges for civilian employees at Ft. Greely which existed prior to their withdrawal on September 1, 1981.

This remedy is consistent with our remedial order in Eielson, which involved virtually identical circumstances. While the General Counsel did not request a "make whole" remedy in Eielson as requested here, we conclude that such a "make whole" order requiring Respondent Brigade to reimburse unit employees at Ft. Greely for monetary losses they may have suffered as a result of the withdrawal of privileges is speculative in nature and therefore inappropriate. Accordingly, since it would not effectuate the purposes and policies of the Statute, the requested "make whole" order is denied.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Department of the Army, 172d Infantry Brigade (Alaska), Fort Richardson, Alaska shall:

1. Cease and desist from:

(a) Unilaterally changing established conditions of employment at Ft. Greely by terminating the commissary and exchange privileges for civilian employees not residing on the installation.

(b) In any like or related manner interfering with, restraining, or coercing unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action:

(a) Reinstate the commissary and exchange privileges for those civilian employees at Ft. Greely not residing on the installation which existed immediately prior to September 1981.

(b) Notify and, upon request, negotiate with the American Federation of Government Employees, Local 1949, AFL-CIO, the exclusive representative of the employees at Ft. Greely, concerning any proposed change in commissary and exchange privileges or any other proposed change in their established conditions of employment.

(c) Post at Ft. Greely copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Brigade Commander and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places at each office where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IX, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

IT IS FURTHER ORDERED that the complaint in Case No. 9-CA-1204, insofar as it alleges a violation of section 7116(a)(1) and (5) of the Statute by Respondent Department of the Army, Fort Greely, Alaska, Respondent Department of the Army Headquarters, U.S. Army Forces Command, Fort McPherson, Georgia, and Department of the Army, The Pentagon, Washington, D.C., be, and it hereby is, dismissed.

Issued, Washington, D.C., October 31, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(23 FLRA No. 105)

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally change established conditions of employment at Ft. Greely by terminating the commissary and exchange privileges for civilian employees not residing on the installation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL reinstate the commissary and exchange privileges for those civilian employees at Ft. Greely not residing on the installation which existed immediately prior to September 1981.

WE WILL notify and, upon request, negotiate with the American Federation of Government Employees, Local 1949, AFL-CIO, the exclusive representative of the employees at Ft. Greely, concerning any proposed change in commissary and exchange privileges or any other proposed change in their established conditions of employment.

____
(Activity)

Dated:________________ By:______________________________
(Signature) (Title)

(23 FLRA No. 105)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director for Region IX, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103-9991, and whose telephone number is: (415) 995-5000.

9/case 402

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 402 REPORT OF CASE DECISIONS November 9, 1986

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UNFAIR LABOR PRACTICE CASES

23 FLRA No. 108 (October 31, 1986)

Department of the Treasury, Internal Revenue Service, Jacksonville District and Department of the Treasury, Internal Revenue Service, Southeast Regional Office of Inspection and National Treasury Employees Union, Case No. 4-CA-40568

23 FLRA No. 109 (October 31, 1986)

Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, New York Region and National Council of Social Security Field Operations Locals-Council 220, American Federation of Government Employees, AFL-CIO, Case Nos. 2-CA-40444, 2-CA-40516 and 2-CA-50037

NEGOTIABILITY CASE

23 FLRA No. 107 (October 31, 1986)

American Federation of Government Employees, Local 1939 and Department of the Air Force, 3415 ABG, Lowry AFB, Colorado, Case No. O-NG-1239

ARBITRATION CASE

23 FLRA No. 106 (October 31, 1986)

Tennessee Valley Authority Watts Bar Nuclear Plant Division of Construction and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (Arbitrator, Williams), Case No. O-Ar-1240

Y3.F31/21-3:

Federal Labor Relations Authority

23 FLRA No. 106

TVA, Watts Bar Nuclear Plant, Division of Construction and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (Williams, Arbitrator), Case No. 0-AR-1240 (Oct. 31, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Agency Definition [7103(a)(3)]	7103(a)(3)
Excludes Tennessee Valley Authority	7122(a)
Procedure	
Forums	
Authority Lacks Jurisdiction	
Agency Not Within Statute Scope [7103(a)(3)]	
Tennessee Valley Authority	

DIGEST NOTES

Because the Tennessee Valley Authority is not and "Executive Agency" within the meaning of section 7103(a)(3), the Authority does not have jurisdiction over an appeal of an arbitration award concerning TVA employees.

READEX FICHE best copy available

Federal
Labor Relations
Authority

23 FLRA No. 107

AFGE, Local 1934 and Dep't of the Air Force, 3415 ABG, Lowry AFB, Colo., Case No. 0-NG-1239 (Decided October 31, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Negotiability	7105(a)(2)(E)
Hours of Work	7106(b)(3)

Negotiability
  Hours of Work
    Alternate Work Schedules
      Compressed Work Schedules (4 day week)
      Federal Employees Flexible and Compressed Work Schedules Act of 1982 [5 U.S.C. sections 3401, 6101 and note, 6106, 6120-6123]
      Forums
        Adverse Agency Impact (FSIP Proceedings)
        Proposals Contrary to Law (Negotiability Proceedings)
5 U.S.C. sec. 6131(a)-(c)
5 U.S.C. sec. 6131(c)(2)
S. Rep. No. 365, 97th Cong., 2d Sess. (1982)
Pub. L. No. 97-221, 96 Stat. 227
Pub. L. No. 99-196, 99 Stat. 1350

DIGEST NOTES

A proposal is negotiable that would enable employees to work workweeks composed of four, ten-hour days. Under the Federal Employees Flexible and Compressed Work Schedules Act of 1982, Permanent Authority (1986), Pub. L. No. 99-196, 99 Stat. 1350, alternate work schedules are fully negotiable, subject only to limitations of the 1982 Act.

As provided under 5 U.S.C. sec. 6131(a)-(c), an agency may object to the negotiation of an alternative work schedule (AWS) proposed by a labor organization only where the agency can establish that the proposed schedule will have an "adverse agency impact." If the parties need third-party assistance to resolve a dispute concerning the alleged adverse agency impact, they must present their dispute to the Federal Service Impasses Panel as provided under 5 U.S.C. sec. 6131(c)(2) and part 2472 of the Panel's rules and regulations. The scope of the Authority's power to review AWS proposals is limited to considering whether the proposed alternative work schedules is contrary to the Act itself or other laws superseding the 1982 Act.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal
Labor Relations
Authority

23 FLRA No. 107

AFGE, Local 1974 and Dep't of the Air Force, 3415 ABG, Lowry AFB, Colo., Case No. 0-NG-1239
(Decided October 31, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Negotiability	7105(a)(2)(E)
Hours of Work	7106(b)(1)

Negotiability
  Hours of Work
    Alternate Work Schedules
      Compressed Work Schedules (4 day week)
      Federal Employees Flexible and Compressed Work Schedules Act of 1982 (5 U.S.C. sections 3401, 6101 and note, 6106, 6120-6133)
      Forums
        Adverse Agency Impact (FSIP Proceedings)
        Proposals Contrary to Law (Negotiability Proceedings)
5 U.S.C. sec. 6131(a)-(c)
5 U.S.C. sec. 6131(c)(2)
S. Rep. No. 365, 97th Cong., 2d Sess. (1982)
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ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CUMULATIVE DIGESTS AND INDICES

Federal Labor Relations Authority

23 FLRA No. 108

Dep't of the Treasury, IRS, Jacksonville District and Dep't of the Treasury, IRS, Southeast Regional Office of Inspections and NTEU, Case No. 4-CA-40568 (Decided October 31, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
Negotiability	7114(a)(2)(B)
Management Rights	7116(a)(1)
Internal Security Practices	7118
Union Representation at Examinations Does Not Interfere	
Unfair Labor Practices	
Agency Violations	
Interference, Restraint, Coercion	
Telephone Surveillance	
Examinations, Interviews and Investigations	
Criminal Investigations are "Examinations"	
"Examination" Involves a Confrontation with Employer	
Legislative History and Analysis of	
Telephone Surveillance Not an "Examination"	
H.R. Rep. No. 1717, 95th Cong., 2d Sess. (1978)	

DIGEST NOTES

The agency did not violate section 7116(a)(1) when, unknown to a revenue officer, the agency monitored and taped his telephone conversation with a taxpayer. The information obtained from the phone conversation was eventually used in disciplinary action brought against the revenue officer. An agency's monitoring of phone calls of an employee suspected of having engaged in improper or illegal conduct does not constitute an "examination" within the meaning of section 7114(a)(2)(B). Thus, since there was not an "examination", the employee did not have the section 7114(a)(2)(B) right to have a union representative present where the employee reasonably believes that the examination may result in disciplinary action. In fact, the presence of a union representative is utterly incongruous with the surreptitious nature of the agency's surveillance activities.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

A Federal employee has the right to union representation in criminal examinations. This right is similar to an employee's right in the private sector as set forth by the Supreme Court decision in NLRB v. J. Weingarten Inc., 420 U.S. 251 (1975). In Weingarten, the Court was concerned with the right of an employee to have "the assistance of his union representative in a confrontation with his employer" (emphasis added). In the Court's view, "[a] single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors" (emphasis added). In these circumstances, the Court concluded "[a] knowledgeable union representative could assist the employer by eliciting favorable facts and save the employer production time by getting to the bottom of the incident occasioning the interview."

Federal Labor Relations Authority

23 FLRA No. 109

HHS, SSA and SSA Field Operations, New York Region and National Council of Social Security Field Operations Locals-Council 220, AFGE, Case Nos. 2-CA-40444, 2-CA-40516 and 2-CA-50037 (Decided October 31, 1986)

SUBJECT MATTER INDEX ENTRIES

Arbitration
  Enforcement of Awards
    ULP Proceedings
      General Counsel's Burden of Proof
  Finality of Awards
    Parts of Awards to which Exceptions are Not Filed
  Leave
    LWOP for Union Activities
Unfair Labor Practices
  Agency Violations
    Otherwise Refuse to Comply with the Statute
  Remedy
    Comply with Arbitration Award

STATUTE

7103(a)(3)
7116(a)(1) and (8)
7118

DIGEST NOTES

• The agency violated section 7116(a)(1) and (8) when it failed to comply with a final and binding arbitration award. The the parties national agreement provided that an employee may, upon written request, be granted LWOP to engage in certain union activities and that such requests normally will be approved. In an arbitration proceeding concerning LWOP, the arbitrator found that the burden was on management to establish, in each instance it intended to refuse a request for LWOP, that the work situation was not normal and that the request therefore could not be granted. The arbitrator further found that the agency had created a restrictive policy of consistent denial of employee requests for LWOP for union activities, after it had already denied their requests for official time for such activities, and that there was no justification for the agency's policy. As his award, the arbitrator ordered, among other things, that the agency convert to LWOP all the absent without leave (AWOL) that had been charged to four employees "provided however, that should the agency prove to the union's satisfaction that particular charges of AWOL . . . were not properly subjects for union LWOP, then such particular charges need not be converted to LWOP."

Although the agency filed exceptions to the arbitrator's award with the Authority, the agency did not except to that part of the award which required conversion of AWOL to LWOP. Following the Authority's denial of the agency's exceptions, the agency refused to convert the employees' AWOL to LWOP as requested by the union.

The Judge determined that the General Counsel had the burden of establishing that no unusual workload situation existed when the agency denied the employees' LWOP requests and that the denial of the request was therefore unjustified. Contrary to the Judge, the Authority held that the General Counsel's burden was to show that the agency had failed and refused to comply with the arbitrator's award which the General Counsel established.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

TENNESSEE VALLEY AUTHORITY
WATTS BAR NUCLEAR PLANT
DIVISION OF CONSTRUCTION

Agency

and

Case No. 0-AR-1240

UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES
OF THE PLUMBING AND
PIPEFITTING INDUSTRY

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator J. Earl Williams filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Rules and Regulations. For the reason stated below, it has been determined that the Union's exceptions must be dismissed.

The award in this case was issued pursuant to an arbitration proceeding between the Union and the Tennessee Valley Authority. Section 7103(a)(3) of the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.) defines "agency" as an "Executive Agency." The latter term is further defined to exclude the Tennessee Valley Authority. Since the Tennessee Valley Authority and its employees are not covered by the Statute, the Authority does not have jurisdiction over the matter.

Accordingly, the Union's exceptions are hereby dismissed.

For the Authority.

Issued, Washington, D.C., October 31, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1934

Union

and

Case No. 0-NG-1239

DEPARTMENT OF THE AIR FORCE,
3415 ABG, LOWRY AFB, COLORADO

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of a single Union proposal.[1]

II. Union Proposal

Alternative Work Program

> e. 4/10 Work Program - An employee may work any consecutive ten hour days during the bandwidth (0600 to 1800) excluding the lunch period. The days off shall be negotiated with the supervisor prior to the end of the pay period that the employee starts the 4/10 work day program. The employee will negotiate a start time and that start time

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[1] The appeal initially concerned two Union proposals. However, in responding to the Agency's statement of position the Union has stated that the dispute concerning one of the proposals (proposal "g") is moot and may be dismissed on that basis. We interpret this as a motion to withdraw the proposal and grant the motion.

> shall be effective for at least one pay period unless mutually agreed to change for uncontrollable personal or emergency reasons.

As explained by the parties, the proposal is concerned with enabling employees to work workweeks composed of four, ten-hour days.

III. Positions of the Parties

The Agency argues that the proposal is inconsistent with sec. 4 of the Federal Employees Flexible and Compressed Work Schedules Act of 1982 (the 1982 Act), Pub. L. No. 97-221, 96 Stat. 227 (codified at 5 U.S.C. §§ 3401, 6101 and note, 6106, 6120-6123), under which it terminated an identical 4/10 work schedule program in 1982. It also argues that insofar as the proposal concerns appropriate arrangements within the meaning of section 7106(b)(3) for employees who were adversely affected by its 1982 decision, the appeal should be dismissed to enable the parties to resume negotiations consistent with the Authority's decision in National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986), or that the record should be reopened for further submissions by the parties as to whether the Union's proposal is negotiable as an appropriate arrangement. The Union argues that the 1982 Act authorizes negotiations on its proposal.

IV. Analysis and Conclusion

The Agency's contentions in support of its motion to dismiss, or in the alternative to reopen the record, do not raise any issues bearing on the proposal's negotiability. The motion is therefore denied. In its deliberations on the 1982 Act, made permanent under the Federal Employees Flexible and Compressed Work Schedules Act of 1982, Permanent Authority (the 1986 Act), Pub. L. No. 99-196, 99 Stat. 1350, Congress found that "[t]he benefits of these schedules to employees were overwhelming." Senate Committee on Governmental Affairs, Federal Employees Flexible and Compressed Work Schedules Act of 1982, S. Rep. No. 365, 97th Cong., 2d Sess. 4 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News at 566. The legislative history also indicates that the use of alternative work schedules was intended to be fully negotiable, subject only to the provisions of the 1982 Act itself. See, for example, S. Rep. No. 365 at 3, 5. See also Federal Labor Relations Authority v. Social Security Administration, 753 F.2d 156, 159-60 (D.C. Cir. 1985); Office of Personnel Management, "Report on Alternative Work Schedules in the Federal Government," in Subcommittee on Human Resources of the House Committee on Post Office and

Civil Service, Federal Employees Flexible and Compressed Work Schedules Act: Hearings on H.R. 1534, Ser. No. 99-I, 99th Cong., 1st Sess. 53-55, 57-58 (1985).

As provided under 5 U.S.C. § 6131(a)-(c), an agency may object to the negotiation of an alternative work schedule (AWS) proposed by a labor organization only where the agency can establish that the proposed schedule will have an "adverse agency impact." If the parties need third-party assistance to resolve a dispute concerning the alleged adverse agency impact, they must present their dispute to the Federal Service Impasses Panel as provided under 5 U.S.C. § 6131(c)(2) and part 2472 of the Panel's Rules and Regulations (5 CFR part 2472). In view of this statutory scheme, the Agency's contentions relating to whether the proposal is negotiable as an appropriate arrangement under section 7106(b)(3) do not raise any issues which the Authority can resolve under section 7117 of the Statute.

There remains, however, a limited range of issues bearing on the negotiation of AWS proposals which the Authority may process under the procedures of section 7117. Nothing in the statutory scheme for resolving disputes over adverse agency impact or the legislative history of the 1982 and 1986 Acts bars application of the procedures of section 7117 to AWS proposals under the 1982 Act where a proposal is alleged to be inconsistent with the 1982 Act itself or with other laws superseding the 1982 Act.[2/]

[2/] In prior decisions the Authority entertained and considered arguments by the parties, under section 7117 of the Statute, concerning whether union AWS proposals were nonnegotiable because they conflicted with management rights under section 7106 of the Statute or agency regulations for which a compelling need exists. American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Madison Region, 21 FLRA No. 104 (1986) (Union Proposal 9); National Treasury Employees Union, Chapter 65 and Department of the Treasury, Internal Revenue Service, 20 FLRA No. 4 (1985). In those cases, as here, the parties did not raise the issue of the extent to which section 7117 procedures apply to disputes over AWS proposals. As we discussed above, those procedures generally do not apply to these disputes. Accordingly, to the extent that these decisions are to the contrary, they will no longer be followed. Those matters should generally be resolved, as intended by the 1982 and the 1986 Acts, with the assistance of the Federal Service Impasses Panel if necessary.

In this case, the Agency claims that the Union's proposed compressed work schedule is identical to the Agency's previous schedule, which was terminated by the Agency pursuant to sec. 4 of the 1982 Act. The Agency argues that under sec. 4 of the Act, the Union had 90 days in which to challenge the termination of the previous compressed work schedule and that by failing to challenge the termination within the 90-day period the Union is precluded from now proposing a schedule identical to the one terminated.

We reject the Agency's argument. Section 4 of the 1982 Act was intended only to apply to work schedules which were initiated as experiments under the 1978 Act. It was not intended to bar the subsequent negotiation of work schedules under the substantive and procedural requirements of the 1982 Act. See S. Rep. No. 365, 97th Cong., 2d Sess. 6 (1982). We therefore conclude that sec. 4 of the 1982 Act is not applicable to the proposal at issue here.

If the parties need third-party assistance to resolve a dispute concerning whether the proposal will result in an adverse agency impact, they must present their dispute to the Federal Service Impasses Panel.

V. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning the Union proposal consistent with this decision.[3]

Issued, Washington, D.C., October 31, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[3] In finding the Union's proposal to be within the duty to bargain, the Authority makes no judgment as to its merits.

23 FLRA No. 108

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE TREASURY, INTERNAL
REVENUE SERVICE, JACKSONVILLE DISTRICT
AND DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, SOUTHEAST
REGIONAL OFFICE OF INSPECTION

Respondent

and

Case No. 4-CA-40568

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the Respondent to the attached Decision of the Administrative Law Judge. The Charging Party (the Union) filed an opposition to the exceptions. The issue is whether the Respondent violated section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute) by conducting an "examination" of an employee in conflict with the employee's right to request union representation under section 7114(a)(2)(B) of the Statute. The Authority finds that the Respondent did not commit an unfair labor practice as alleged.

II. Background and Judge's Decision

As part of an investigation into the manner in which a Revenue Officer handled a tax collection matter, the Respondent's inspector arranged to have the taxpayer discuss the issue with the Revenue Officer in phone conversations initiated from the taxpayer's home. Unknown to the Revenue Officer, the conversation was monitored and taped by the Respondent. The information obtained from the phone conversations was eventually used in disciplinary action brought against the Revenue Officer.

The Judge decided that the phone conversations constituted an "examination," that the Revenue Officer's right to request union representation under section 7114(a)(2)(B) of the Statute had been violated, and that the use of the investigative technique thus violated section 7116(a)(1) of the Statute, as alleged. As a remedy, the Judge recommended an order which would require the Respondent to rescind the disciplinary action and to reconsider the basis for such action without referring to the information obtained from the phone conversations.

III. Positions of the Parties

The Respondent argues that it did not commit the violation alleged in the complaint because the investigation at issue was in connection with a criminal matter and section 7114(a)(2)(B) was not intended to be applicable to criminal investigations. As part of this argument, it also implicitly argues that application of section 7114(a)(2)(B) to preclude it from using such investigative techniques would interfere with its right to determine its internal security practices under section 7106(a)(1) of the Statute. The Respondent also disputes the Judge's recommended remedy. The Union supports the Judge's Decision.

IV. Analysis and Discussion

A. Rights under § 7114(a)(2)(B)

Section 7114(a)(2)(B) of the Statute provides that in any examination of a unit employee by an agency representative in connection with an investigation, the employee shall have the right to have a union representative present if the employee reasonably believes that the examination may result in disciplinary action and requests representation.

The legislative history of this section discloses that Congress' purpose in enacting section 7114(a)(2)(B) was to create representation rights for Federal employees equivalent to the rights provided employees by the National Labor Relations Board (NLRB) in interpreting the National Labor Relations Act (NLRA). See 124 Cong. Rec. 29184 (1978), reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, H.R. Comm. Print 96-7, 96th Cong., 1st Sess. 926 (1979), where Congressman Udall explained that the purpose of the House bill provisions which led to enactment of section 7114(a)(2)(B) was to reflect the Supreme Court's decision in NLRB v. J. Weingarten Inc., 420 U.S. 251 (1975), in which the Court deferred to the NLRB's interpretation of the NLRA. See also Internal Revenue Service v. FLRA, 671 F.2d 560, 563 (D.C. Cir. 1982), enforcing Internal Revenue Service, Washington, D.C., 4 FLRA 237 (1980) (holding that under section 7114(a)(2)(B), whether an employee has a reasonable belief that discipline may result from an examination is determined, as under Weingarten, by an objective test).

The Senate/House conferees recognized, however, that the right might evolve differently under the Statute than under the NLRA, and accordingly stated their intent that the evolution of decisions interpreting the right in the private sector would not necessarily be determinative for the Federal sector. Civil Service Reform Act: Conference Report, H.R. Rep. No. 1717, 95th Cong., 2d Sess. 156 (1978), reprinted in Legislative History at 824.

B. Whether section 7114(a)(2)(B) is applicable to examinations arising out of criminal investigations

Section 7114(a)(2)(B) refers to "any examination" of an employee . . . . in connection with "an investigation" (emphasis added). The Conference Report essentially tracks the statutory language. Conference Report, H. R. Rep. No. 1717, 95th Cong., 2d Sess. 156 (1978) reprinted in Legislative History at 824. Congress was undoubtedly aware that, unlike the private sector, many Federal agencies (including the Respondent) conduct criminal investigations that sometimes (as here) include their own employees. Section 7114(a)(2)(B), however, does not exclude or refer in any way to criminal investigations. Accordingly, it is our view that Congress intended section 7114(a)(2)(B) to apply to all examinations in connection with all investigations, not just to examinations of employees in connection with non-criminal matters.

Our conclusion is buttressed by the practice in the Postal Service wherein the NLRB has applied Weingarten rights to the examination of postal employees, who are governed by private sector labor law, in connection with criminal investigations. See United States Postal Service, 241 NLRB 141 (1979); United States Postal Service, 254 NLRB 703 (1981). Further, Weingarten itself involved the investigation of an employee accused of criminal acts.

Finally, we find that applying section 7114(a)(2)(B) rights to examinations in connection with criminal investigations would not interfere with the right of management to determine its internal security practices under section 7106(a)(1) of the Statute. The presence of a

Union representative at an examination does not interfere with management's right to insist that the employee be responsive, or its right to decide the scope of the examination, or the extent of the Union's legitimate role as a representative. See Weingarten, 420 U.S. at 261; Office of Personnel Management, Washington, D.C., 17 FLRA 302 (1985); Norfolk Naval Shipyard, 9 FLRA 458 (1982).

We find that section 7114(a)(2)(B) applies to requests by an employee for union representation at an examination by an agency representative in connection with a criminal investigation. We conclude that this result (1) comports with the language of section 7114(a)(2)(B) and the intent of Congress, (2) is consistent with the Supreme Court's explanation of the parameters of the right to representation in Weingarten,[1] and (3) does not conflict with management's legitimate prerogatives or its right to determine its internal security practices.

C. Whether the Respondent interfered with the employee's rights under section 7114(a)(2)(B) of the Statute

The Authority concludes that the telephone surveillance at issue here, involving the agency's monitoring of phone calls of an employee suspected of having engaged in improper or illegal conduct does not constitute an examination within the meaning of section 7114(a)(2)(B). As discussed above in section A, the legislative history of section 7114(a)(2)(B) establishes that its incorporation in our Statute was for the purpose of granting to Federal employees the same rights to representation in employer examinations held by private sector employees set forth in the Supreme Court's Weingarten decision. The Court in Weingarten was not addressing those facets of a criminal investigation such as a telephone surveillance in which it is essential to the success of the surveillance for the employee to be unaware that his conversation is being monitored. In fact, the presence of a union representative is utterly incongruous with the surreptitious nature of the agency's surveillance activities.

In contrast, in Weingarten, the Court was concerned with the right of an employee to have "the assistance of his union representative in a confrontation with his employer" (emphasis added). Weingarten at 260. In the Court's view, "[a] single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors" (emphasis added). Id. at 262-63. In these circumstances, the Court concluded "[a] knowledgeable union representative could assist the employer by eliciting favorable facts and save the employer production time by getting to the bottom of the incident occasioning the interview. Id. at 263.

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[1] For a discussion of extensions of Weingarten in the private sector, see C. J. Morris (ed.), The Developing Labor Law: Vol. I, 151-54 (2d ed. 1983) and J. Harper II, S. Logothetis, & H. Datz (eds.), The Developing Labor Law: Second Edition, First Supplement, 32-35 (1985).

In this case, there was no direct questioning or examination of the employee by agency management. Management's involvement was limited to monitoring the conversation between a Revenue Officer and a taxpayer. Moreover, the conversations took place without the employee being aware that the questions and his answers were being monitored. Thus, at no time during these conversations did the employee feel compelled to respond to questions posed by the taxpayer. Although an officer of the agency may have precipitated the taxpayer's action, there was no direct interaction between the employee and agency management since it was the taxpayer who initiated the talks and elicited information. Thus, we find that the monitoring here, in which management played the passive role of listening rather than participating in the conversations, does not constitute an "examination of an employee . . . by a representative of the agency in connection with an investigation" within the meaning of the Statute but rather is a form of surveillance.

The General Counsel's allegation encompasses an expansion of employee representational rights that is inconsistent with section 7114(a)(2)(B) and unduly interferes with management's right under section 7106(a)(1) of the Statute to investigate alleged wrongdoing by its employees and determine internal security practices. It would produce the anomalous prohibition that agencies could not engage in unannounced surveillance of allegedly dishonest employees as an investigative technique without first informing the employee of what was being done and providing an opportunity to request representation. We do not believe that Congress intended such an unlikely result.

Based on the analysis set forth above we conclude that the monitoring of the conversation between the IRS agent and the taxpayer did not constitute an "examination" within the meaning of section 7114(a)(2)(B) of the Statute. Given this conclusion, there is no basis to find that the agency violated section 7116(a)(1) of the Statute as alleged in the complaint.

V. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and affirms those rulings. The Authority has considered the Judge's Decision, the exceptions to that Decision, the opposition to the exceptions, the positions of the parties, and the entire record, and adopts the Judge's findings and conclusions only to the extent consistent with this decision. We conclude that the Respondent, in the circumstances of this case, did not interfere with, restrain, or coerce employee Miller in the exercise of any of his rights under section 7114(a)(2)(B) of the Statute, and we shall dismiss the complaint. In view of this conclusion, we do not pass upon the merits of the Judge's recommended remedial Order.

ORDER

IT IS ORDERED that the complaint in Case No. 4-CA-40568 be, and it hereby is, dismissed in its entirety.

Issued, Washington, D.C. October 31, 1986

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

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DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, JACKSONVILLE DISTRICT AND DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, SOUTHEAST REGIONAL OFFICE OF INSPECTION

Respondent

and   Case No. 4-CA-40568

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

. . . .

Regina N. Kane, Esquire
For the General Counsel

Robert M. Finer, Esquire
For the Respondent

Timothy C. Welsh, Esquire
FOr the Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101 *et seq*. and the Rules and Regulations issued thereunder.

Pursuant to a charge filed on July 24, 1984, by the National Treasury Employees Union (hereinafter called the NTEU or Union), a Complaint and Notice of Hearing was issued on August 20, 1985, by the Regional Director for Region IV, Federal Labor Relations Authority, Atlanta, Georgia. The Complaint alleges that the Department of the Treasury, Internal Revenue Service, Jacksonville District and the Department of the Treasury, Internal Revenue Service, Southeast Regional Office of Inspection (hereinafter called Respondent or IRS), violated Section 7116(a)(1) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by utilizing a third party to conduct a wire tapped telephone examination of bargaining unit employee Steven W. Miller in such a manner as to preclude Mr. Miller from exercising his Section 7114(a)(2)(B) right to request the presence of a union representative.

A hearing was held in the captioned matter on October 1, 1985 in Daytona Beach, Florida. All parties were afforded the opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The Charging Party, Respondent and General Counsel submitted post-hearing briefs on December 2, 1985, which have been duly considered.[1]

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact,[2] conclusions, and recommendations.

Findings of Fact

The NTEU is the exclusive representative "of certain employees of the Department of the Treasury." Included in the unit are a number of employees working in the IRS, Jacksonville, Florida, District Office, which encompasses, among other areas, the Daytona Beach, Florida, Field Office.

Mr. Steven W. Miller was employed as an Internal Revenue Officer in Daytona Beach, Florida and as such was included in the unit represented by the NTEU. Among Mr. Miller's duties as a Revenue Officer was the collection of funds from delinquent taxpayers.

Sometime in April 1983, Mr. George Edwards, Mr. Miller's group supervisor, contacted Mr. Robert Dan Clark, Jr. an inspector with the IRS Internal Security Division[3] in Jacksonville, Florida, and informed him that he had reason to believe that Mr. Miller may have mishandled a "collection" which had been assigned to him. Mr. Edwards further informed Mr. Clark that he had also received information that Mr. Miller might be "personally or socially acquainted with the taxpayer."4/

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[1] In the absence of any objection, Respondent's Motion To Correct the Transcript, should be, and hereby is, granted.

[2] The facts, for the most part, are not in dispute.

[3] Mr. Clark described his duties as follows: "Conduct investigations which may be either criminal or non-criminal. These investigations generally impact upon the integrity of IRS, normally concerning violations or suspected violations of U.S. Criminal Code or the Internal Revenue Code, Title 18 and Title 26. Normally involving suspected attempts to interfere with proper functioning by employees or persons outside the service, by threats and assault, bribery, impersonations, conflict of interest. We also conduct some investigations of an administrative type nature or non-criminal type cases involving suspected misconduct by IRS employees."

Mr. Clark subsequently initiated an investigation of the matter and determined that the delay in the collection of delinquent taxes from Taxpayer A was based on false information appearing on a certain form in the taxpayer's file which indicated that Taxpayer A had been unemployed at the time in question.

Inasmuch as Taxpayer A had in fact been employed at the time and denied giving false information to the contrary to Mr. Miller, who was a friend of a co-worker of Taxpayer A, it was incumbent on Mr. Clark to determine who in fact was responsible for the false information on the form, Mr. Miller or Taxpayer A.

Envisioning an "obvious response" from an inquiry to Mr. Miller, that the document "truly reflects what she, Taxpayer A, told him," Mr. Clark was of the opinion that the best way to resolve any credibility dispute was to monitor a telephone conversation on the matter between Taxpayer A and Mr. Miller.

On March 30, 1984, at 8:52 a.m. and 9:20 a.m. pursuant to arrangements with Mr. Clark, Taxpayer A placed two telephone calls from her residence to Mr. Miller at the Internal Revenue Office located in Daytona Beach, Florida. Both the telephone calls were monitored and recorded by Mr. Clark and fellow inspector Mailoux. Taxpayer A consented to the wire taps.

The transcripts of the two telephone conversations reveal that Taxpayer A discussed the subject matter of the investigation, namely the false information concerning her work status and elicited damaging testimony from Mr. Miller concerning the false information on the IRS form.

At no time during the telephone conversations was Mr. Miller informed that the conversations were being initiated by, and monitored by, IRS representatives. Similarly, Mr. Miller was never informed of his right to Union representation.

Mr. Clark testified that the use of wire taps was an extremely valuable tool in which to resolve credibility both for and against IRS agents who have been accused by taxpayers of various indiscretions etc. He further testified that denying the IRS the use of such investigative aids, would impede their work.

4/ The parties agreed that the taxpayer's name would not be disclosed. Accordingly, the taxpayer will be referred to as "Taxpayer A."

Discussion and Conclusions

The General Counsel and the Charging Party take the position that the monitored telephone conversations constituted a Section 7114(a)(2)(B) interview wherein Mr. Miller should have been provided the opportunity to request representation. Inasmuch as Respondent's action in surreptitiously monitoring the telephone conversation was designed to interview Mr. Miller without his knowledge, Respondent knowingly and intentionally deprived Mr. Miller of his Section 7114(a)(2)(B) right to request representation. In such circumstances Respondent violated Section 7116(a)(1) of the Statute.

Respondent urges dismissal of the complaint on the ground that there is no evidence in the record indicating that Mr. Miller would have requested representation if he had been made aware of the fact that his conversations were being monitored. Additionally, Respondent urges dismissal on the ground that the legislative history does not establish that the so called "Weingarten" rights to representation were intended to apply to criminal investigations.

Before Section 7114(a)(2)(B) of the Statute becomes applicable it must be shown (1) that an examination is being conducted, (2) in connection with an investigation, (3) that the employee involved reasonably believes that the examination may result in discipline and (4) the employee requests representation.

With respect to (1) and (2) above it is clear that the monitored telephone calls from Taxpayer A to Mr. Miller were intended to be an examination in connection with an investigation to determine who was responsible for the false information appearing on the IRS form. If in fact it could be determined from such telephone calls that Mr. Miller was the guilty party there is no doubt that that discipline would result.[5] In this latter connection the transcript of the telephone conversation indicates that Mr. Miller was concerned about what action would be taken by Respondent it it concluded that he was responsible for the false information. Finally, with regard to the last element, i.e. employee request for representation, while it is true as contended by Respondent that the record is devoid of any evidence indicating that Mr. Miller would have requested representation, I find that under all the circumstances herein, Respondent is foreclosed from relying upon the absence of such evidence. Having purposely deprived Mr. Miller of knowledge of the examination, Respondent can hardly defend its actions on the ground that there is no evidence of a request for representation when, due to Respondent's surreptitious behavior, Mr. Miller was clearly not aware of the fact that an examination was being conducted and as a consequence was deprived of the opportunity to request representation. To insist at this late date, i.e. subsequent to a notice of proposed suspension based on damaging testimony elicited during the wiretapped conversations, that Mr. Miller take the stand and attest to the fact that he would have requested representation if he had known that an examination was being conducted is absurd. This is particularly true when one of the requested remedies is the suppression of the testimony secured by Respondent through the wiretap.

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[5] In fact the telephone interview did lead to a proposed suspension for Mr. Miller.

Concerning Respondent's second ground for dismissal, i.e., that Section 7114(a)(2)(B) of the Statute is not applicable to criminal investigations, I find that the Authority has found to the contrary. Thus, in Lackland Air Force Base, Texas, and American Federation of Government Employees, Local 2911, AFL-CIO, 5 FLRA 473, 485, the Authority affirmed the Administrative Law Judge's conclusion that employee was entitled to union representation during the course of an examination to determine whether or not the employee was guilty of a crime. The Administrative Law Judge noted that since the examination was conducted jointly by the Respondent's managers and Respondent's independent criminal investigative branch, the employee was entitled to union representation at all interviews, criminal and administrative alike.

While Respondent acknowledges the Authority's decision in Lackland Air Force Base, supra, it takes the position that it is not controlling since the issue of the applicability of Section 7114(a)(2)(B) to criminal investigations was not specifically discussed. According to Respondent, since the legislative history is silent on the matter, there was no intention of Congress to include criminal investigations within the representational rights accorded employees under Section 7114(a)(2)(B) of the Statute. Respondent's argument in this latter regard was raised and thoroughly treated by Chief Administrative Law Judge John H. Fenton in Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Southeast Regional Office, Atlanta, Georgia, and NTEU, Case No. 4-CA-1138, OALJ-84-03, October 21, 1983. To the extent that Judge Fenton found after an exhaustive analysis of the legislative history, that Section 7114(a)(2)(B) applies to any investigation which may reasonably lead to discipline, I agree. In reaching this latter conclusion I adopt, Judge Fenton's well reasoned analysis of the legislative history.

Accordingly, having failed to allow Mr. Miller the opportunity to exercise his Section 7114(a)(2)(B) rights, I find that the Respondent has interfered with, restrained and coerced Mr. Miller in violation of Section 7116(a)(1) of the Statute.

Having found that Respondent violated Section 7116(a)(1) of the Statute by virtue of its action in depriving Mr. Miller of his Section 7114(a)(2)(B) rights to union representation, it is hereby recommended that the Authority issue the following order designed to effectuate the purposes and policies of the Statute.6/

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute, the Authority hereby orders that Department of the Treasury, Internal Revenue Service, Jacksonville District and Department of the Treasury, Internal Revenue Service, Southeast Regional Office of Inspection shall:

1. Cease and desist from:

    (a) Engaging in investigatory interviews of bargaining unit employees, which may lead to disciplinary action, by means of consensually monitored telephone calls which conceal the fact that an investigation is underway, and thus operate to deprive employees of the right to request and receive representation by the National Treasury Employees Union, their exclusive collective bargaining representative.

    (b) Using or relying upon in any internal disciplinary proceeding the transcript and/or information derived from, any consensually monitored telephone call made by an undisclosed agent of management which conceals the nature and purpose of the telephonic investigation and/or examination and precludes the affected employee from requesting Union representation.

    (c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

6/ Having surreptitiously conducted an examination of Mr. Miller which deprived him of his rights to union representation and as a consequence elicited certain damaging information, I find it appropriate, as urged by the Charging Party, to suppress the use of such information by Respondent in any internal disciplinary proceedings. Otherwise, Respondent would benefit from its illegal action to the detriment of Mr. Miller, who as found above was deprived of his statutory rights.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) To the extent that management may have relied upon information derived from monitored telephone calls made by an undisclosed agent of management which concealed the nature and purpose of the telephonic investigation and/or examination, re-evaluate any internal discipline imposed, taking care to exclude from such deliberations the information surreptitiously obtained through the monitored telephonic investigation.

(b) Post at its Jacksonville, Florida, District Office and Southeast Regional Office of Inspection facilities copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by authorized representatives, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director for Region IV, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

BURTON S. STERNBURG
Administrative Law Judge

Dated: December 30, 1985
Washington, D.C.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) To the extent that management may have relied upon information derived from monitored telephone calls made by an undercover agent of management which contained the content and purpose of the telephonic investigation and/or examination, re-evaluate any internal discipline imposed, taking care to exclude from such deliberations the information surreptitiously obtained through the monitored telephonic conversations.

(b) Post at its Jacksonville, Florida, District Office and Greenville, Georgia, Branch Office, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by authorized representatives, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, for Region IV, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

BURTON S. STERNBURG
Administrative Law Judge

Dated: December 10, 1980
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain or coerce any bargaining unit employee in the exercise of the Statutory right to be represented by the National Treasury Employees Union during an investigatory interview which may reasonably lead to discipline, by conducting a monitored examination through another individual who is an undisclosed agent of management, thus concealing the nature and purpose of the interrogation and precluding the opportunity for Union representation.

WE WILL NOT use in any internal disciplinary proceedings transcripts, and/or information derived from any consensually monitored telephone calls made by an undisclosed agent of management which conceals the nature and purpose of the telephonic investigation and/or examination and precludes the affected employee from requesting union representation.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce any employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, to the extent that we have relied upon information derived from telephone calls made by an undisclosed agent of management which concealed the nature and purpose of the telephonic investigation and/or examination, re-evaluate any internal discipline imposed, taking care to exclude from such deliberations the information surreptitiously obtained through the monitored telephonic investigation.

____
(Agency or Activity)

Dated: ______________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region IV, whose address is: 1776 Peachtree Street, N.W., Suite 501, North Wing, Atlanta, Georgia 30309 and whose telephone number is: (404) 881-2324.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY
ADMINISTRATION AND SOCIAL
SECURITY ADMINISTRATION FIELD
OPERATIONS, NEW YORK REGION

Respondent

and

Case Nos. 2-CA-40444
2-CA-40516
2-CA-50037

NATIONAL COUNCIL OF SOCIAL
SECURITY FIELD OPERATIONS
LOCALS-COUNCIL 220, AMERICAN
FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This consolidated unfair labor practice case is before the Authority on exceptions filed by the General Counsel to the attached Decision of the Administrative Law Judge. The consolidated complaint alleged that by failing and refusing to convert Absent Without Leave (AWOL) time to Leave Without Pay (LWOP) for four employees the Respondent failed to comply with a final and binding arbitration award, in violation of section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute).

II. Background and Judge's Conclusion

The parties' National Agreement provided that an employee may, upon written request, be granted LWOP to engage in certain union activities and that such requests normally will be approved. When the requests for LWOP of some employees were denied, and they were charged with

AWOL or forced to take annual leave, the Charging Party (the Union) grieved. The Arbitrator found that the burden was on management to establish in each instance that the work situation was not normal and that the request therefore could not be granted. The Arbitrator further found that the Respondent had created a restrictive policy of consistent denial of employee requests for LWOP for union activities, after it had already denied their requests for official time for such activities, and that there was no justification for the Respondent's policy. The Arbitrator concluded that the policy was violative of the parties' collective bargaining agreement. The Arbitrator also concluded that the Respondent's persistent denials of the requests of the employees in the dispute before him were not justified by the workload situations in their offices and that the denials were violative of the parties' agreement. As his award, the Arbitrator directed the Respondent to act on future LWOP requests in accordance with the Statute and with the agreement. The Arbitrator ordered the Respondent to convert to LWOP all the AWOL that had been charged, "provided however, that should the Agency prove to the Union's satisfaction that particular charges of AWOL . . . were not properly subjects for Union LWOP, then such particular charges need not be converted to LWOP."

The Respondent filed exceptions with the Authority to that part of the Arbitrator's award concerning treatment of future requests for LWOP by union officials. The Respondent did not except to that portion of the award which ordered conversion of LWOP. The exceptions were denied by the Authority as failing to establish that the award was in any way deficient. The Union then requested the Respondent to comply with the award by converting the AWOL time of the four employees in this unfair labor practice case to LWOP, as originally sought by the employees for union activities and denied by the Respondent. The Respondent refused to convert all of the AWOL time to LWOP. As to one of the employees, the Respondent gave no reason for refusing to convert the AWOL time. As to two of the employees, the Respondent refused essentially on the ground that they had been found to be insubordinate. As to the fourth employee, the Respondent did not respond to the Union's request. The parties stipulated that the Respondent did not prove to the Union's satisfaction that the instances in which the employees were charged with AWOL time were not properly subjects for LWOP time for union activities.

The Judge found that the Arbitrator's award provided no specific methodology for resolving disputes "in situations wherein the Union had a legitimate basis for objecting to Respondent's stated reasons for refusing to convert specific AWOL to LWOP." The Judge also found that there was no basis for concluding that the award provided for ultimate determination by the Union as to whether AWOL should be converted to LWOP in specific situations. The Judge determined that the General Counsel had the burden of establishing that no unusual workload situation existed when the Respondent denied the employees' LWOP requests and that the denial of the request was therefore unjustified. The Judge concluded that the General Counsel did not meet that burden and, therefore, dismissed the complaint.

III. Positions of the Parties

In exceptions to the Judge's Decision, the General Counsel takes issue with the Judge for placing the burden of justification on the General Counsel. Basically, the General Counsel argues that the Arbitrator's award clearly granted the Union the right to accept or reject the Respondent's explanations for refusing to convert any particular AWOL or annual leave charge to LWOP. The basic arguments of the Respondent in its brief to the Judge were adopted by the Judge in his Decision.

IV. Analysis

We disagree with the Judge's dismissal of the complaint. The Arbitrator ordered conversion of all AWOL to LWOP, unless the Respondent could "prove to the Union's satisfaction" that the employees' LWOP requests were not for union activities. The Respondent did not file exceptions to this part of the award. The award was final and binding on the Respondent. See Department of the Treasury, United States Customs Service, New York Region, New York, New York, 21 FLRA No. 119 (1986). We disagree with the Judge's determination that the General Counsel had a burden of proving that the Respondent's denial of the original LWOP requests of each of the four employees in this case was not justified in the specific work situations involved. The Arbitrator specifically found that the Respondent's restrictive policy of consistently denying employee requests for LWOP for union activities was unjustified and violative of the parties' agreement. The Arbitrator ordered conversion of all AWOL charged as a result of the Respondent's improper denials of LWOP requests, specifically including the AWOL time charged to three of the four employees in this case for "incorrect denials of LWOP requests." The General Counsel's burden was to show that the Respondent had failed and refused to comply with the Arbitrator's award. That is, the General Counsel had to establish two elements: (1) that the Respondent had refused to convert AWOL time to LWOP where LWOP had been requested for union activities; and (2) that the Respondent had failed to prove to the Union's satisfaction that the employees' original requests for LWOP were not properly subjects for LWOP for union activities. The record reflects that the General Counsel established both elements. Accordingly, we find that the Respondent failed to fully comply with the Arbitrator's award in violation of section 7116(a)(1) and (8) of the Statute.

V. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and affirms those rulings. The Authority has considered the Judge's Decision, the exceptions to that Decision, the positions of the parties, and the entire record, and adopts the Judge's findings and conclusions only to the extent consistent with this decision. We conclude that the Respondent's failure to comply with a final and binding Arbitrator's award constitutes a violation of section 7116(a)(1) and (8) of the Statute and we shall order the Respondent to remedy the violation.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, New York Region shall:

1. Cease and desist from:

(a) Failing and refusing to fully implement the June 11, 1983 arbitration award issued in FMCS Case No. 82K/09368 by Arbitrator Walter L. Eisenberg by failing and refusing to properly process Union requests for the conversion of AWOL and forced annual leave to LWOP in accordance with the award after it became final and binding.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Comply with the June 11, 1983 arbitration award issued in FMCS Case No. 82K/09368 by Arbitrator Walter L. Eisenberg by properly processing Union requests for the conversion of AWOL and forced annual leave to LWOP in accordance with the award.

(b) Post at its facilities in the Department of Health and Human Services, Social Security Administration, Field Operations, New York Region, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Regional Commissioner, New York Region, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., October 31, 1986

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to fully implement the June 11, 1983 arbitration award issued in FMCS Case No. 82K/09368 by Arbitrator Walter L. Eisenberg by failing or refusing to properly process Union requests for the conversion of AWOL and forced annual leave to LWOP in accordance with the award after it became final and binding.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL comply with the June 11, 1983 arbitration award issued in FMCS Case No. 82K/09368 by Arbitrator Walter L. Eisenberg by properly processing Union requests for the conversion of AWOL and forced annual leave to LWOP in accordance with the award.

____
(Activity)

Dated: ______________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region II, Federal Labor Relations Authority, whose address is: 26 Federal Plaza, Room 3700, New York, New York 10278, and whose telephone number is: (212) 264-4934.

(23 FLRA No. 109)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
SOCIAL SECURITY ADMINISTRATION, AND
SOCIAL SECURITY ADMINISTRATION, FIELD
OPERATIONS, NEW YORK REGION

Respondent

and

Case Nos. 2-CA-40444
2-CA-40516
2-CA-50037

NATIONAL COUNCIL OF SOCIAL SECURITY
FIELD OPERATIONS LOCALS - COUNCIL
220, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Charging Party

L. J. Clary, Esquire
For the Respondent

Allan W. Stadtmauer
For the General Counsel

Cecelia McCarthy, Esquire
For the Charging Party

Before: LOUIS SCALZO
Administrative Law Judge

DECISION

Statement of the Case

This case arose as an unfair labor practice proceeding under the provisions of the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. § 7101, et seq. (hereinafter referred to as "the Statute"), and the Rules and Regulations issued thereunder.

The consolidated complaint, as amended at the hearing, alleged that the Department of Health and Human Services, Social Security Administration, and Social Security Administration, Field Operations, New York Region (Respondent) committed unfair labor practices within the meaning of

Sections 7116(a)(1) and (8) of the Statute by failing and refusing to comply with a final arbitration award issued on June 11, 1983, by Arbitrator Walter L. Eisenberg in FMCS File No. 82K/09368.

The following was alleged as a basis for failing and refusing to comply with the mentioned arbitration award:

Case No. 2-CA-40444: On or about July 25, 1984, the Respondent failed and refused to convert certain Absent Without Leave (AWOL) time charged to bargaining unit employee Ralph de Juliis, to Leave Without Pay (LWOP) time.

Case No. 2-CA-40516: On or about August 31, 1984, the Respondent failed and refused to convert certain AWOL time charged to former bargaining unit employees Joseph Higgins and Kirk Bigelow, respectively, to LWOP time.

Case No. 2-CA-50037: On or about September 17, 1984, the Respondent failed and refused to convert certain AWOL time charged to former bargaining unit employee Mary Ostrowski, to LWOP time.

The parties were represented by counsel during the hearing and were afforded full opportunity to be heard, adduce relevant evidence, and examine and cross-examine witnesses. Based upon the entire record herein, including a stipulation of facts, exhibits, arguments made during the hearing, and briefs filed by the parties, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

1. At all times material herein, the Charging Party has been, and is now, a labor organization within the meaning of Section 7103(a)(4) of the Statute.

2a. At all times material herein, the Department of Health and Human Services, Social Security Administration, has been, and is now, an agency within the meaning of Section 7103(a)(3) of the Statute.

b. At all times material herein, Social Security Administration, Field Operations, New York Region, located in New York, New York, has been, and is now, a constituent entity within the Department of Health and Human Services, Social Security Administration, and an agent acting on its behalf.

c. At all times material herein, the Social Security Administration, Passaic, New Jersey; New Brunswick, New Jersey; and Midtown New York District Offices and North Harlem Branch Office have been, and are now, constituent entities within the Department of Health and Human Services, Social Security Administration, and agents acting on its behalf.

3a. At all times material herein, the American Federation of Government Employees, AFL-CIO (AFGE or Union) has been, and is now, the certified exclusive representative of a consolidated nationwide unit of certain employees of Respondent, including all employees in the District and Branch Offices of the Social Security Administration in the States of New York and New Jersey, excluding all management personnel, professional employees, federal employees engaged in personnel work in other than a purely clerical capacity, guards and supervisors.

b. At all times material herein, AFGE has delegated to the Charging Party authority to act as its representative for the purposes of collective bargaining for certain of Respondent's employees, including employees at Respondent's Passaic, New Jersey; New Brunswick, New Jersey; and Midtown New York District Offices and North Harlem Branch Office; and the Charging Party's delegation has been recognized by Respondent.

4. At all times material herein, a National Agreement has existed between the AFGE, and the Respondent. This agreement became effective on June 11, 1982 (Jt. Exh. No. 12).

5. On or about June 11, 1983, Arbitrator Walter L. Eisenberg issued an arbitration award in AFGE Local 3369 and DHHS, Social Security Administration, FMCS File No. 82K/09368. The award, issued pursuant to the negotiated grievance and arbitration procedure set out in the National Agreement, involved the Respondent and AFGE Local 3369, and related to the Respondent's processing of Union requests for LWOP under the provisions of the National Agreement (Jt. Exh. No. 13).

6. On or about June 30, 1983, the Respondent filed exceptions to the award issued by Arbitrator Eisenberg in FMCS File No. 82K/09368 (Jt. Exh. No. 14).[1]

7. On or about April 20, 1984, the Authority denied the exceptions filed by the Respondent in connection with Arbitrator Eisenberg's award in FMCS File No. 82K/09368, and the award became final and binding (Jt. Exh. No. 15).

8a. On or about June 25, 1984, the Charging Party by letter dated June 25, 1984, requested that the Respondent comply with Paragraph 5 of the final and binding award described above by converting certain AWOL charged to unit employee Ralph de Juliis, to LWOP (Jt. Exh. No. 16).

b. The instances of AWOL cited in the June 25, 1984, letter were originally sought by de Juliis as Union LWOP, but were denied.

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[1] The exceptions mistakenly refer to Arbitrator Eisenberg's award as being dated June 4, 1983, rather than June 11, 1983 (Tr. 60-61).

c. On or about July 25, 1984, Respondent by its agents, did not convert de Juliis' AWOL to LWOP (Jt. Exh. No. 20).

d. At no time material herein has Respondent proved to the Union's satisfaction that the instances of AWOL cited in the June 25, 1984 letter to the Respondent were not properly subjects of Union LWOP.

9a. On or about July 11, 1984 and July 20, 1984, the Charging Party, by letters reflecting these dates, requested the Respondent to comply with Paragraph 5 of the final and binding award described above by converting certain AWOL charged to former unit employees Joseph Higgins and Kirk Bigelow, respectively, to LWOP (Jt. Exh. Nos. 17, and 18 (a)).

b. The instances of AWOL cited in the July 11, 1984 and July 20, 1984 letters described above were originally sought by Higgins and Bigelow, respectively, as Union LWOP but were denied except for the June 16, 17 and 23, 1982 requests of Bigelow and the June 22, 23, 24, 1982 requests of Higgins (Jt. Exh. Nos. 21 and 22).[2]

c. On or about August 31, 1984, Respondent, by its agents failed to convert AWOL time for Joseph Higgins and Kirk Bigelow to LWOP (Jt. Exh. Nos. 21 and 22).

d. At no time material herein has Respondent proved to the Union's satisfaction that the instances of AWOL cited in the July 11, 1984 and July 20, 1984, letters transmitted to the Respondent on behalf of Higgins and Bigelow respectively were not properly subjects of Union LWOP.

10a. On or about September 17, 1984, the Charging Party by letter requested Respondent to comply with Paragraph 5 of the final and binding award described above by converting certain AWOL charged to former unit employee Mary Ostrowski to LWOP (Jt. Exh. No. 19).

b. The instances of AWOL cited in the September 17, 1984 letter described above were originally sought by Ostrowski as Union LWOP, but were denied except for the August 2, 1982 request.

c. At all times since on or about September 17, 1984, Respondent by its agents has not converted Mary Ostrowski's AWOL to LWOP.

d. At no time material herein has Respondent proved to the Union's satisfaction that the instances of AWOL cited in the September 17, 1984 letter described above, were not properly subjects of Union LWOP.

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[2] Jt. Exh. No. 22 reflects that Bigelow's LWOP requests for June 16, 18 and 23, 1982 were granted by the Respondent.

11. Since on or about April 20, 1984, and at all times thereafter, Respondent has not converted all AWOL time to Union LWOP as directed by the June 11, 1983 award.

Discussion and Conclusions

Arbitrator Eisenberg's June 11, 1983 arbitration award arose out of a contractual dispute concerning the interpretation of Article 31, Section 7-B of the National Agreement, the collective bargaining agreement governing the labor relations of the Respondent and AFGE. This Section provides:

> Section 7 - Leave Without Pay
>
> . . . .
>
> B. An employee may be granted leave without pay to engage in union activities on the national, district or local level, to work in programs sponsored by the Union or the AFL-CIO, upon written request by the appropriate union office. Such requests will be referred to the appropriate management official and will normally be approved. Such employees shall continue to accrue benefits in accordance with applicable OPM regulations. Leave without pay for this purpose is limited to one (1) year, but may be extended or renewed upon proper application.

In this arbitration proceeding the AFGE pressed a claim for less restrictive grants of LWOP for Union officials engaged in tasks dealing with labor-management relations. Arbitrator Eisenberg found in favor of the Union, and upheld the Union's claim for a less restrictive interpretation of the provision. He found that it related to LWOP requested by a Union office for an employee to engage in Union activities, and further that it "states unequivocally that such LWOP requests by a Union 'will normally be approved.'" (Jt. Exh. No. 13 at 14-15).

The burden of justifying a denial was placed on management. That is, management was required to make an explicit showing as to why a LWOP request should not be granted "because of an identified non-normal situation." (Jt. Exh. No. 13 at 15). He found that requests for LWOP filed by de Juliis, Higgins and Bigelow had not been denied in accordance with the collective bargaining agreement, and that the District Offices which these Union officials were assigned to had not "experienced workload situations beginning June 11, 1982 which justified persistent denials of LWOP to those officials." (Jt. Exh. No. 13 at 17). He reiterated specifically that "[t]he burden of proving the existence of a work situation that is not normal is on the Agency." (Jt. Exh. No. 13 at 17). Arbitrary agency restriction of Union LWOP was found to be violative of the National Agreement, and Respondent's practice of delaying action on Union LWOP requests until 8:30 A.M. of the morning on which the Union LWOP was to be used was condemned as tending to "trivialize the involvement of Union officials in labor management relations." (Jt. Exh. No. 13 at 19). He concluded:

> In sum, I find that the record before me supports the Union's complaint that the Agency has created a restrictive special policy for response to and consistent denial of requested LWOP after it has denied a Union request for official time, and I find that there is nothing in the National Agreement or in valid past practice thereunder which can serve to justify such a policy. The Agency's actions with reference to Union LWOP thus constitute violations of the applicable provisions of the National Agreement. (Jt. Exh. No. 3 at 20-21).

The award fashioned by the Arbitrator required the Respondent to:

> 1. Grant both long and short term LWOP to union officials under "normal working conditions."
>
> 2. Grant or deny union LWOP promptly after it receives LWOP requests. Advise the Union promptly of its response; and not delay doing so until 8:30 A.M. on the date the leave is to be used.
>
> 3. Deal with future LWOP requests in a manner consistent with the Statute and the collective bargaining agreement.
>
> 4. Construe Article 31, Section 7-B of the June 11, 1982 National Agreement as "normally" requiring approval of Union LWOP for Union officials for the purposes specified in this contractual provision.

Paragraph 5 of the Award fashioned the following specific remedy:

> (1) restore to Union LWOP, all charges to Union officials of AWOL and annual leave which should have been granted as Union LWOP; provided however, that should the Agency prove to the Union's satisfaction that particular charges of AWOL and annual leave were not properly subjects for Union

> LWOP, then such particular charges need not be converted to LWOP;
>
> 2. change to Union LWOP all AWOL charges to Kirk Bigelow, Joseph Higgins, and Ralph de Juliis for 'incorrect denials' of LWOP; provided however, that should the Agency prove to the Union's satisfaction that particular charges of AWOL against any of these individuals were not properly subjects for Union LWOP then such particular charges of AWOL need not be converted to LWOP; and provided that any conversion of AWOL charges to LWOP charges hereby required shall not be construed to constitute a finding as to the conduct of any of these three employees in the circumstances pertaining to any particular AWOL charge;
>
> 3. in the future when it undertakes to deny requested Union LWOP, provide to the Union, in advance, a statement of the nature of the departure from normal conditions or of the nature of any 'exigency' said to be the basis for the denial, together with the name and title of the management representative who is declaring the departure from normal conditions or the exigency of business; and
>
> 4. grant Union LWOP for longer than one day at a time, subject to the conditions in Article 31, Section 7, B, of the National Agreement, as construed by the terms of this Award.

It is clear from the record that the June 11, 1983 award contemplated the Respondent's good faith cancellation of all AWOL which should have been granted as Union LWOP under the terms of the award. It further contemplated that in situations wherein the Respondent deemed conversion inappropriate, conversion of such AWOL to LWOP would be excused if the Agency proved to the Union's satisfaction that particular charges should not be converted. This element of the decision in turn envisions that the Union would not act arbitrarily in refusing to acknowledge in appropriate cases that particular charges of AWOL should not be converted. However, the decision itself does not specifically address the issue of what action, if any, should be taken by the Respondent in situations wherein the Union had a legitimate basis for objecting to Respondent's stated reasons for refusing to convert specific AWOL to LWOP. That is, the arbitrator's decision provides no specific methodology for resolving such disputes, and does not relate to identifiable instances wherein conversion of AWOL should occur under the terms outlined in the award. Presumably, issues relating to questioned determinations were to be made in grievance arbitration proceedings, or in the course of unfair labor practice proceedings.

The award does indicate that any conversion of AWOL charges required by the terms of the award "shall not be construed to constitute a finding as to the conduct of [de Juliis, Higgins or Bigelow] in the circumstances pertaining to any particular AWOL charge." The quoted language suggests that the arbitrator envisioned Respondent's possible conversion of AWOL to LWOP in some or all situations involving alleged misconduct of these three employees, and further that the administrative fact of conversion would have no evidentiary significance in related disciplinary matters.

In contrast to the meaning of the award outlined, counsel for the General Counsel argues that the Eisenberg award leaves to the Union the ultimate determination as to whether an AWOL charge should be converted to LWOP. There is no rational basis for drawing this conclusion from the June 11, 1983 award, or any other documents in the record. This argument would operate to negate entirely those elements of the award requiring the Respondent to determine and then remedy prior incorrect denials of LWOP.

Relieving the Respondent of responsibility to convert in situations wherein the Union expressed satisfaction with a refusal to convert merely points out the obvious. That is, that conversion in such situations would be unnecessary and illogical. It may not be assumed that the arbitrator intended the Union to have absolute discretion to require the conversion of all AWOL time not converted by the Respondent regardless of the relative merits of each individual request for LWOP. Although, the language used in the decision could have made this point clearer, the fact remains that this meaning necessarily follows from the terms used in the award.[3]

---

[3] Authority decisions have held that union proposals which would operate to obligate an agency to grant an employee's request for LWOP without any regard to the necessity for the employee's services during the period covering the request would be inconsistent with management's right pursuant to Section 7106(a)(2)(B) of the Statute "to assign work." American Federation of Government Employees, AFL-CIO, Local 2263, 15 FLRA No. 126 (1984), 15 FLRA 580; American Federation of Government Employees, AFL-CIO, Local 12, 18 FLRA No. 58 (1985), 18 FLRA 418. Similarly, an arbitrator's award likewise may not interfere with the exercise by an agency of its rights under Section 7106(a) of the Statute. Veterans Administration, Lebanon, Pennsylvania, 11 FLRA No. 43 (1982), 11 FLRA 193; American Federation of Government Employees, AFL-CIO, Local 12, supra. The record reflects no basis for concluding that the June 11, 1983 arbitration award denied management's rights.

The General Counsel's complaint rests entirely upon the theory that the Respondent failed to convert AWOL time in accordance with demands made upon the Respondent, and further that the Respondent failed to prove to the Union's satisfaction that Respondent's refusal to convert AWOL time was proper. As noted, the arbitration award did not provide such a remedy. A showing of a failure to comply with Union demands, or a showing of a failure to satisfy Union concerns, without more, would not necessarily equal non-compliance with the arbitration award. The General Counsel has the burden of establishing specifically that Respondent's denial of LWOP fell within the purview of the June 11, 1983 award. That is, that no unusually pressing working conditions existed to justify Respondent's refusal of LWOP. Such a showing is not reflected in the record.[4]

The record reflects reliance upon a letter dated June 25, 1984 requesting the conversion of "all AWOL" time relating to de Juliis to LWOP (Jt. Exh. No. 16). Neither the award, nor the record furnishes a basis for such a demand. At most the award requires only the conversion of AWOL time associated with LWOP requests incorrectly denied prior to the June 11, 1983 arbitration award. There was no showing that any specific de Juliis request for LWOP was incorrectly denied within the context of the arbitration award. The General Counsel's reliance upon Respondent's July 25, 1984 refusal to comply with the de Juliis request (Jt. Exh. No. 20), without more, would not suffice to establish a failure to comply with the award.

Similarly, both Higgins and Bigelow demanded the conversion of all AWOL charged to them (Jt. Exh. Nos. 17, 18(a), and 18(b)), and Ostrowski demanded the conversion of all AWOL time charged to her (Jt. Exh. No. 19), without reference to the Respondent's obligation to utilize criteria outlined in the June 11, 1983 arbitration award. A showing of Respondent's refusal to comply with these three requests, without more, would not suffice to establish proof of non-compliance with the award.

Instead of establishing specific instances wherein AWOL was incorrectly denied under the principles outlined in the award, the prosecutive theory was made to rest on the erroneous premise that the Respondent was under an obligation to convert all of the AWOL time referred to in the Higgins, Bigelow and Ostrowski letters.

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[4] The General Counsel is not helped by the stipulation that since on or about April 20, 1984, and at all times thereafter, Respondent has not converted all AWOL time to Union LWOP as directed by the arbitrator's award. The award reflects that the arbitrator did not require the conversion of all AWOL time to Union LWOP, and any other meaning conveyed by the mentioned stipulation of fact is unclear at best.

It is regrettably noted that elements of the record do in fact suggest that the Respondent may not have followed the arbitrator's instructions in each and every instance; however, on the basis of the record presented it is not possible to make a finding concerning any specific failure to convert AWOL time in accordance with principles outlined in the award. Moreover, the complaint, resting entirely on the broad demands for conversion reflected in the de Juliis, Higgins, Bigelow and Ostrowski correspondence, and on Respondent's admitted failure to satisfy the Union with a rationale for refusing to convert, does not allege any specific instances of failure to convert in accordance with the terms of the award. In view of the foregoing, and since the record reflects no showing of specific non-compliance with the award, it is determined that the consolidated complaint should be dismissed. It is recommended that the Authority issue the following Order pursuant to 5 C.F.R. § 2423.29.

ORDER

IT IS HEREBY ORDERED, that the consolidated complaint in Case Nos. 2-CA-40444, 2-CA-40516, and 2-CA-50037, be, and it hereby is, dismissed.

LOUIS SCALZO
Administrative Law Judge

Dated: August 15, 1985
Washington, D.C.

9/Case No. 403

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Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 403 REPORT OF CASE DECISIONS November 17, 1986

UNFAIR LABOR PRACTICE CASES

24 FLRA No. 3 (November 12, 1986)

Veterans Administration, Washington, D.C. and Veterans Administration, Medical and Regional Office Center, Fargo, North Dakota and American Federation of Government Employees, AFL-CIO, Case No. 7-CA-40438

24 FLRA No. 4 (November 13, 1986)

Philadelphia Naval Shipyard and Philadelphia Metal Trades Council, Case No. 2-CA-40243

24 FLRA No. 5 (November 13, 1986)

Defense Mapping Agency Aerospace Center, St. Louis, Missouri and National Federation of Federal Employees, Local 1827, Case No. 7-CA-20482

NEGOTIABILITY CASE

24 FLRA No. 1 (November 10, 1986)

National Federation of Federal Employees, Local 1655 and Adjutant General of Illinois, Case No. 0-NG-1198

ARBITRATION CASES

24 FLRA No. 2 (November 10, 1986)

Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO (Smith, Arbitrator), Case No. 0-AR-1253

24 FLRA No. 6 (November 17, 1986)

Lexington-Blue Grass Army Depot, Lexington, Kentucky and American Federation of Government Employees, AFL-CIO, Local 894 (Thomson, Arbitrator), Case No. 0-AR-1156

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Federal Labor Relations Authority

24 FLRA No. 1

NFFE, Local 1655 and Adjutant General of Illinois, Case No. 0-NG-1198 (Decided November 10, 1986

SUBJECT MATTER INDEX ENTRIES	STATUTE
INFORMATION, EMPLOYEE AND UNION RIGHTS	7105(a)(2)(E) 7114(b)(4)
PRIVACY	
PRIVACY ACT [5 U.S.C. 552a]	
EXCEPTION: ROUTINE USE [5 U.S.C. 552a(b)(3)]	
TYPES OF INFORMATION SOUGHT	
NAMES AND ADDRESSES OF EMPLOYEES	
UNITED STATES CODE	
5 U.S.C. 552a [PRIVACY ACT]	
5 U.S.C. 552a(b)(3)	
5 U.S.C. 552a(b)(6)	

DIGEST NOTES

The release of names and home addresses of unit employees to the union is not prohibited by the Privacy Act [5 U.S.C. 552a], is necessary for the union to fulfill its duties under the Statute, and meets the requirements for disclosure under section 7114(b)(4). A proposal is negotiable that requires the agency to provide the union with the home addresses of all union members in the bargaining unit.

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Federal Labor Relations Authority

24 FLRA No. 2

HHS, SSA and AFGE, Case No. 0-AR-1253 (Decided November 10, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
ARBITRATION AWARDS, REVIEW OF, PROCEDURE	7122(a)(1)
TIMELINESS	7122(a)(2)
BENCH RULINGS IN A BIFURCATED ARBITRATION PROCESS	
EX PARTE HEARINGS	
VOLUNTARY NONPARTICIPATION IN A HEARING	
FINALITY OF AWARD	
BENCH RULINGS	

DIGEST NOTES

An arbitrator's bench rulings in a bifurcated arbitration process are final and ripe for filing exceptions with the Authority at that time. While an agency may elect not to participate in the hearing at which the bench awards are made, it acts at its own peril. The computation of the time limit for filing exceptions to an arbitrator's bench ruling begins when it is rendered. The fact, as in this case, that one party to the process chooses not to participate at the hearing, and consequently does not receive a copy of the arbitrator's bench ruling at the same time as another party who was at the hearing, does not alter the time limits in which to file exceptions with the Authority.

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Federal Labor Relations Authority

24 FLRA No. 3

VA, Washington, D.C. and VA Medical and Regional Office Center, Fargo, N.D. and AFGE, Case No. 7-CA-40438 (Decided November 12, 1986)

SUBJECT MATTER INDEX ENTRIES

AGENCY ULP (ALLEGED) 7116(a)(5)
HEALTH AND SAFETY
CLOTHING
PROTECTIVE CLOTHING
TOXIC SUBSTANCES
COLLECTIVE BARGAINING PROCESS AND THE DUTY TO BARGAIN
MID-TERM BARGAINING
BARGAINING OBLIGATION ABSENT REOPENER PROVISION
AGENCY NOT OBLIGATED TO BARGAIN OVER UNION-INITIATED . . . PROPOSALS
MANAGEMENT INITIATED CHANGES IN CONDITIONS OF EMPLOYMENT
PROPOSALS NOT ALLEGED TO BE NONNEGOTIABLE
HEALTH AND SAFETY
POLICY
GUIDELINES, CHANGES IN
TOXIC SUBSTANCES
CHEMOTHERAPEUTIC AGENTS
UNFAIR LABOR PRACTICES, PROCEDURE
CONTENTIONS OR EVIDENCE NOT PRESENTED TO THE FLRA R.D.
AUTHORITY REGULATIONS (2429.5) PRECLUDE CONSIDERATION OF
UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
BARGAINING ORDER
DECISION TO MAKE THE CHANGE
RETROACTIVE APPLICATION OF ANY AGREEMENT REACHED
A REMEDIAL ORDER MIGHT INTERFERE WITH THE FLEXIBILITY . . . OF SUBSEQUENT NEGOTIATIONS

STATUTE

7103(3), (4), (10) AND (11)
7106(b)(1)
7116(a)(1) and (5)
7117(d)(2) and (3)

DIGEST NOTES

While an agency may not have a duty to bargain on union-initiated mid-term proposals absent a reopener provision in the parties' agreement, once the agency changes working conditions of unit employees, a duty to bargain is created. The agency issued and implemented new policy guidelines for the safe handling of chemotherapeutic agents which are use to treat some

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

cancer patient's. Although chemotherapy may cure a patient's cancer, research has shown that there are health hazards to those persons who administer the drugs used in chemotherapy. Thus a change in the policy governing the handling of the drugs affects the conditions of employment of affected health care personnel and gives rise to a duty to bargain.

The Judge found that one meeting between the parties concerning the new policy did not constitute bargaining. Furthermore the meeting was more in the nature of a meeting where the union explained its proposals and management made brief comments and objections as to some of the proposals. There was no give-and-take negotiations typical of bargaining sessions. No written agreements were entered. The meeting concluded in less than an hour with both parties expecting management to set another meeting after the union submitted its proposals in writing. But there was not a subsequent meeting and management made only minor changes to its proposed policy.

The Authority held that the agency violated section 7116(a)(1) and (5) by failing and refusing to bargain in good faith with the union and by unilaterally implementing guidelines on the safe handling of chemo agents. In so finding, the Authority did not consider the agency's contentions that certain proposals were not negotiable because they were raised for the first time in the agency's exceptions to the Judge's decision. Section 2429.5 of the Authority's rules and regulations precludes the consideration of evidence by a party, or any issue, which was not presented in the proceeding before the Regional Director, Hearing Officer, Administrative Law Judge, or Arbitrator.

A remedy is not appropriate that would require the retroactive application to any agreement reached by the parties in bargaining pursuant to a bargaining order. In the circumstances of this case, the Authority held that a prospective bargaining order will best effectuate the purposes and policies of the Statute. It is neither inadequate nor inherently restrictive of the parties' rights to address the effects on unit employees of changes already made. Rather, it allows the parties the flexibility to bargain freely with regard to how past actions may have affected employees and the opportunity to agree to retroactive application of the agreement.

Federal
Labor Relations
Authority

24 FLRA No. 4

Philadelphia Naval Shipyard and Philadelphia Metal Trades Council, Case No. 2-CA-40243
(Decided November 13, 1986)

SUBJECT MATTER INDEX ENTRIES

AGENCY ULP (ALLEGED) 7116(a)(5)
  INFORMATION
AGENCY ULP (ALLEGED) 7116(a)(8)
  7114(b)(4)
INFORMATION, EMPLOYEE AND UNION RIGHTS UNDER THE STATUTE
  ALTERNATE MEANS OF ACCOMPLISHING THE OBJECTIVE
    MERE EXISTENCE INSUFFICIENT FOR DENIAL OF NAMES AND
    . . . ADDRESSES OF UNIT EMPLOYEES
  NECESSITY OR RELEVANCE FOR FULL AND PROPER DISCUSSION
    ALTERNATIVES
      MERE EXISTENCE OF OTHER MEANS NOT SUFFICIENT FOR
      . . DENIAL OF NAMES AND ADDRESSES
  PRIVACY
    PRIVACY ACT [5 U.S.C. 552a]
      EXCEPTION: ROUTINE USE [5 U.S.C. 552a(b)(3)]
  TYPES OF INFORMATION SOUGHT
    NAMES AND ADDRESSES OF EMPLOYEES

STATUTE

7114(b)(4)
7116(a)(1), (5) and (8)
7118

DIGEST NOTES

The release of the names and home addresses of bargaining unit employees to the exclusive representative is not prohibited by the Privacy Act, is necessary for unions to fulfill their duties under the Statute and meets the other requirements of section 7114(b)(4). Agencies are required to furnish such information without regard to whether alternative means are available or adequate for the union to communications with unit employees. Considering a case on remand from the United States Court of Appeals for the District of Columbia Circuit, the Authority held that the agency violated section 7116(a)(1), (5) and (8) when the agency failed to provide the requested information.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal
Labor Relations
Authority

24 FLRA No. 5

Defense Mapping Agency Aerospace Center, St. Louis, Mo. and NFFE, Local 1827, Case No. 7-CA-20482 (Decided November 13, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
AGENCY ULP (ALLEGED) 7116(a)(5) INFORMATION	7114(b)(4) 7116(a)(1), (5) and (8)
AGENCY ULP (ALLEGED) 7116(a)(8) 7114(b)(4)	7118

INFORMATION, EMPLOYEE AND UNION RIGHTS UNDER THE STATUTE
  ALTERNATE MEANS OF ACCOMPLISHING THE OBJECTIVE
    MERE EXISTENCE INSUFFICIENT FOR DENIAL OF NAMES AND
      . . . ADDRESSES OF UNIT EMPLOYEES
  NECESSITY OR RELEVANCE FOR FULL AND PROPER DISCUSSION
    ALTERNATIVES TO REQUESTED INFORMATION
      MERE EXISTENCE OF OTHER MEANS NOT SUFFICIENT FOR DENIAL
        . . . OF NAMES AND ADDRESSES
  PRIVACY
    PRIVACY ACT [5 U.S.C. 552a]
      EXCEPTION: ROUTINE USE [5 U.S.C. 552a(b)(3)]
        NAMES AND HOME ADDRESSES OF UNIT EMPLOYEES
  REASONABLY AVAILABLE [7114(b)(4)(B)]
UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
  INFORMATION TO BE PROVIDED UNION

DIGEST NOTES

The release of the names and home addresses of bargaining unit employees to the exclusive representative is not prohibited by law, is necessary for unions to fulfill their duties under the Statute and meets the other requirements of section 7114(b)(4). The release of the information is permitted under the "routine use" exception of the Privacy Act [5 U.S.C. section 552a(b)(3)]. Agencies are required to furnish such information without regard to whether alternative means are available or adequate for the union to communications with unit employees. Considering a case on remand from the United States Court of Appeals for the Eighth Circuit, the Authority held that the agency violated section 7116(a)(1), (5) and (8) when the agency failed to provide the requested information. The names and addresses of unit employees were reasonably available to the agency and it would not have provided an undue burden on the agency to provide the information requested.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

24 FLRA No. 6

Lexington-Blue Grass Army Depot, Lexington, Ky. and AFGE (Thomson, Arbitrator), Case No. 0-AR-1156 (Decided November 17, 1986

SUBJECT MATTER INDEX ENTRIES

- ARBITRATION AWARDS, REMEDIES ORDERED
  - . . BY ARBITRATORS
    - BACKPAY
    - LEAVE AWARDED
      - RESTORE ANNUAL LEAVE
- ARBITRATION AWARDS, REVIEW OF, EXCEPTIONS ASSERTED IN APPEAL
  - AWARD CONTRARY TO AGENCY REGULATION FOR WHICH A COMPELLING
    - . . . NEED EXISTS
      - ARMY CIVILIAN PERSONNEL REG. 990-2 (C11), SUBCH. 610.S3
      - DOD CIVILIAN PERSONNEL MANUAL SUP. 990-2, BOOK 610
- COMPELLING NEED [7117(a)(2)]
  - AGENCY REGULATIONS FOR WHICH A COMPELLING NEED IS CLAIMED
    - ESSENTIAL TO THE ACCOMPLISHMENT OF THE AGENCY MISSION
      - ARMY CIVILIAN PERSONNEL REGULATION
        - 990-2 (C11), SUBCHAPTER 610.S3
      - DOD CIVILIAN PERSONNEL MANUAL SUP. 990-2, BOOK 610
  - CRITERIA FOR DETERMINING COMPELLING NEED
    - ESSENTIAL TO THE ACCOMPLISHMENT OF THE AGENCY MISSION
      - BROAD BALANCING OF FACTORS IS APPROPRIATE IN
        - . . . EVALUATING COMPELLING NEED
      - FINANCIAL CONSIDERATIONS
- FACILITIES, EQUIPMENT AND SERVICES
  - CLOSING OF FACILITIES OR REDUCTIONS TO THEIR OPERATIONS
    - ENERGY CONSERVATION MEASURE
- LAYOFF, RESERVED MANAGEMENT RIGHT [7106(a)(2)(a)]
  - FINANCIAL CONSIDERATIONS

STATUTE

7106(a)(1)
7117
7122(a)

DIGEST NOTES

A broad balancing of factors is appropriate in evaluating compelling need assertions. In National Association of Government Employees, Local R14-62 and U.S. Army Dugway Proving Ground, Dugway, Utah, 18 FLRA No. 38 (1985), the Authority held that a demonstration of monetary savings alone is sufficient to establish that a regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the agency's

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

mission. Such a finding is one criterion for determining whether or not there is a compelling need of an agency regulation. Reconsidering and overruling that finding, the Authority held that effectiveness and efficiency of Government operations cannot be measured solely in monetary terms. Although financial considerations can be relevant to a determination of whether an agency regulation satisfies the compelling need criterion set forth in section 2424.11(a) of the Authority's regulations, other considerations are also pertinent.

The dispute for which arbitration was sought involved the partial closure of the activity's facilities in order to conserve energy. Employees were charged with either annual leave or leave without pay. The arbitrator concluded that since the activity in this case had not considered any means of conserving energy other than closure and its decision was based in part on anticipated excessive absenteeism, the activity had unfairly and partially treated employees and had violated applicable rules and regulations. As his award, the arbitrator ordered that those employees on annual leave were to have their leave restored, and those employees on leave without pay were to receive 8 hours pay.

In its exception, the agency contended that the award was contrary to agency regulations for which a compelling need existed. The Authority held that the agency's exception did not establish a basis for finding the award deficient. The agency failed to demonstrate how its regulations would be essential or even helpful in achieving its objective of conserving energy through partial closure of its facility. The same amount of energy would be conserved whether employees were on annual leave or administrative leave. The agency's compelling need claim was based on a prior finding by the Authority of the compelling need for specified regulations based solely on financial considerations. In this case the Authority reconsidered and overruled its prior decision.

Finally, an agency's decision to shut down or curtail operations is an aspect of management's right to layoff under section 7106(a)(1). However, the agency did not claim, not does it appear, that anything in the arbitrator's award would prevent the agency from deciding to shut down facilities.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1655

Union

and Case No. 0-NG-1198

ADJUTANT GENERAL OF ILLINOIS

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed by the Union under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents an issue concerning the negotiability of the following Union proposal:

> The Union has a right to all Union members['] home addresses. This will be furnished by the Employer to the Union twice (2) a year, once in January and once in July.

For the reasons which follow, we conclude that the Union's proposal is within the duty to bargain.

II. Positions of the Parties

The Agency, in its Statement of Position, contends that release of Union members' home addresses is prohibited under section (b)(6) of the Privacy Act, 5 U.S.C. § 552a (1982), and is, therefore, exempt from disclosure under section 7114(b)(4) of the Statute. The Agency argues that the employees' privacy interest in their home addresses outweighs the necessity of providing that information for the Union's purposes. Additionally, the Agency filed a response to the Authority's request for *amicus* briefs concerning the issue of disclosure of names and home addresses of unit employees. 51 Fed. Reg. 21,416 (1986). In its response, the Agency contends that the proposal in this case concerning disclosure of home addresses of "Union" members is distinguishable from the request for disclosure of home addresses of "unit" members, which the Second Circuit found the Privacy Act did not prohibit. American Federation of Government Employees, Local 1760 v. FLRA, 786 F.2d 554 (2d Cir. 1986), reversing Social Security Administration, Northeastern Program Service Center, 19 FLRA No. 108 (1985). The Agency argues that some Union members (for example, retirees) may not also be unit members and that it, therefore, may not have the information requested by the Union.

The Union contends that its proposal comes under the "routine use" exemption of the Privacy Act, 5 U.S.C. § 552a(b)(3). It argues that the information requested is necessary to fully represent unit employees and that the Agency is obligated to disclose the information under section 7114(b)(4) of the Statute.

III. Analysis and Conclusion

In the Decision and Order on Remand in Farmers Home Administration Finance Office, St. Louis, Missouri, 23 FLRA No. 101 (1986), we held that the agency was required to furnish the names and home addresses of unit employees to the exclusive representative. After considering the record in that case and amicus submissions filed in response to the Authority's notice in the Federal Register, we concluded that the release of names and home addresses of unit employees to the union is not prohibited by the Privacy Act, is necessary for the union to fulfill its duties under the Statute, and meets the requirements for disclosure under section 7114(b)(4) of the Statute.

Based on the Union's statements and arguments in its Response to the Agency's Statement of Position, we construe the proposal as applying only to Union members who are employees in the bargaining unit exclusively represented by the Union. Since the proposal would require the Agency to provide the Union with the home addresses of employees in the unit, the proposal is not significantly different from the union's request in Farmers Home Administration Finance Office. Accordingly, for the reasons set forth more fully in Farmers Home Administration Finance Office, we conclude that the home addresses requested in the Union's proposal are subject to disclosure under section 7114(b)(4), and that the proposal is within the duty to bargain.

IV. Order

The Agency shall upon request, or as otherwise agreed to by the parties, bargain on the Union's proposal.*/

Issued, Washington, D.C., November 10, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In finding the proposal to be within the duty to bargain, the Authority makes no judgment as to its merits.

24 FLRA No. 2

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, SOCIAL SECURITY
ADMINISTRATION

Agency

and

Case No. 0-AR-1253

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the bench ruling(s) of Arbitrator Justin Smith filed by the Agency pursuant to section 7122(a) of the Federal Service Labor Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reason stated below, it has been determined that the exceptions must be dismissed as untimely filed.

This case involves a dispute submitted to the Arbitrator concerning official time for representational activities. By agreement of the parties, a two-phase arbitration process was established to resolve the basic dispute and the resulting numerous individual grievances. The first phase involved the interpretation of the official time provisions of the Statute and the parties' collective bargaining agreement. In the second phase, the Arbitrator held hearings to resolve, by bench decisions when practicable, specific grievances pending in various regions of the Agency. The exceptions in this case have been filed to bench decisions of the Arbitrator rendered at ex parte hearings held on August 6 and 7, 1986 at which the Agency declined to participate. The official trancript of the hearings was apparently served on the parties by mail on September 24, 1986.

Under section 7122(b) of the Statute, as amended,[1] and section 2425.1 of the Authority's Rules and Regulations, as amended,[2] which amendments are applicable to exceptions pending or filed with the Authority on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to computation of the time limit here involved, any exceptions to the Arbitrator's rulings in this case had to be filed, that is, received in the national office of the Authority not later than the close of business on September 4 and 5, 1986, respectively. However, the Agency's exceptions were not filed with the Authority until October 23, 1986.

The Agency asserts essentially that because the instant arbitration hearings were conducted ex parte, no representative of the Agency was present at the hearing to be served with notice of the Arbitrator's bench decisions in question. The Agency contends, therefore, that since its exceptions were filed within thirty days after it was served with the official transcript of the hearing, which is the date that it received notice of the Arbitrator's bench decisions, the exceptions were timely filed.

It is well settled, particularly in cases involving other related bench rulings between these same parties, that the Arbitrator's bench rulings are final when rendered and ripe for filing exceptions with the Authority at that time. See American Federation of Government Employees and Social Security Administration, 21 FLRA No. 14 (1986); U.S. Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO, 22 FLRA No. 16 (1986); U.S. Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO, 23 FLRA No. 19 (1986). Further, with respect to the due process considerations raised by the Agency, the Authority concludes that such argument must be rejected. The record clearly indicates that while the

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[1] Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an Arbitrator's award begins on the date the award is served on the filing party.

[2] 49 Fed. Reg. 22623 (1984).

(24 FLRA No. 2)

Agency did not participate at the instant hearings at which the Arbitrator's bench awards were made, it voluntarily chose not to do so and, thus, acted at its own peril. Consequently, in these circumstances, the fact that the Agency was not served with the Arbitrator's bench decisions when they were rendered at the hearings did not toll the related time periods for filing exceptions which began on August 6 and 7, 1986, and expired on September 4 and 5, 1986, respectively.

Accordingly, as the Agency's exceptions were untimely filed, they are hereby dismissed.

For the Authority.

Issued, Washington, D.C., November 10, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION
WASHINGTON, D.C.

and

VETERANS ADMINISTRATION MEDICAL
AND REGIONAL OFFICE CENTER
FARGO, NORTH DAKOTA

Respondents

and Case No. 7-CA-40438

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Administrative Law Judge's Decision filed by the Veterans Administration, Washington, D.C. and Veterans Administration Medical and Regional Office Center, Fargo, North Dakota (the Respondents). This case involves the Respondents' alleged failure and refusal to bargain in good faith with the American Federation of Government Employees, AFL-CIO (Union) and Respondents' unilateral implementation of policy guidelines for the safe handling of chemotherapeutic agents by bargaining unit employees in violation of section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute). For the reasons stated below, we find that the Respondents violated section 7116(a)(1) and (5) of the Statute by failing to fully bargain with the Union.

II. Facts

On February 2, 1984, the Respondents forwarded to the Union a proposed policy guideline for the safe handling of chemotherapeutic (chemo) agents that the Union had been seeking for over one year. Immediately thereafter, on February 3, the Union requested bargaining on these guidelines. The parties met in a 45-minute bargaining session on February 21, 1984, at which time the Union presented and explained 18 proposals. The Respondent Medical Center made brief comments and objections as to some of the proposals and declared only one nonnegotiable. The Respondents' representative requested the Union to submit its proposals in writing and stated that another bargaining session would be arranged. No further bargaining took place, however, and on March 2, the Respondent Medical Center forwarded the revised policy to the Union stating that the majority of the Union's proposals did not address the policy and that it had incorporated some of the Union's wording. On March 5, 1984, the Respondent Medical Center sent the Union a memorandum saying, in effect, that it would not discuss the proposals further. Finally, on April 2, 1984, the Respondents implemented the new policy that incorporated some of the Union's suggested wording made at the February 21 meeting.

III. Administrative Law Judge's Decision

The Judge concluded that the Respondents failed and refused to bargain in good faith with the Union and unilaterally implemented policy quidelines on the safe handling of chemo agents in violation of section 7116(a)(1) and (5) of the Statute. She found that the Union had negotiable proposals on the bargaining table at the time the alleged failure to bargain and the unilateral implementation occurred. She also found that while the Union did have "great impact in formulating" the policy guidelines and that some bargaining took place, such bargaining fell short of the statutory obligation imposed upon management. The Judge's cease-and-desist Order included retroactive application of any agreement reached pursuant to a bargaining request made by the Union.

IV. Exceptions to the Judge's Decision

The Respondents excepted to the Judge's finding that they did not meet their bargaining obligation. They took the position that they were not required to bargain as to the substance of proposals concerning the guideline because they involved the exercise of management rights and did not fail or refuse to bargain concerning the impact and implementation of the guidelines. The Respondents also took the position that they had no obligation to negotiate with the Union regarding union-initiated midterm proposals concerning the handling of chemo agents. Finally, they argue that it was inappropriate for the Judge to order retroactive relief.

V. Analysis

We find in agreement with the Judge and based on her rationale that the Respondents violated section 7116(a)(1) and (5) of the Statute by failing and refusing to bargain in good faith with the Union and by unilaterally implementing guidelines on the safe handling of chemo agents. In so finding, we have not considered the Respondents' negotiability contentions as to the Union's proposals because they were raised for the first time in the Respondents' exceptions to the Judge's Decision. In accordance with section 2429.5 of the Authority's Rules and Regulations, "the Authority will not consider evidence by a party, or any issue, which was not presented in the proceeding before the Regional Director, Hearing Officer, Administrative Law Judge or arbitrator." Accordingly, as this issue was not previously raised before the Judge in this proceeding it will not be considered. Immigration and Naturalization Service, Washington, D.C., 4 FLRA 787 (1980).

Further, we find no merit to the Respondents' argument presented in the exceptions that they had no obligation to bargain over union-initiated midterm proposals. While the Respondents have no duty to bargain on union-initiated midterm proposals, once the Respondents forwarded to the Union a proposed policy guideline for the safe handling of chemo agents and changed working conditions of unit employees by subsequently issuing them, a duty to bargain was created. See Internal Revenue Service, 17 FLRA 731 (1985), petition for review filed sub nom. National Treasury Employees Union v. FLRA, No. 85-1361 (D.C. Cir. June 14, 1985).

VI. Remedy

We disagree with that part of the Judge's Order giving retroactive application to any agreement reached by the parties pursuant to a bargaining request by the Union. In the circumstances of this case, a prospective bargaining order will best effectuate the purposes and policies of the Statute. It is neither inadequate nor inherently restrictive of the parties' rights to address the effects on unit employees of changes already made. Rather, it allows the parties the flexibility to bargain freely with regard to how past actions may have affected employees and the opportunity to agree to retroactive application of the agreement. Environmental Protection Agency, 21 FLRA No. 98 (1986).

VII. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision, the positions of the parties and the entire record, and adopts the Judge's findings, conclusions, and recommended Order for the reasons discussed above.

Therefore, the Authority concludes that the Respondents violated section 7116(a)(1) and (5) of the Statute by failing to fully bargain with the Union and by implementing guidelines on the safe handling of chemotherapeutic agents.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Veterans Administration, Washington, D.C. and Veterans Administration Medical and Regional Office Center, Fargo, North Dakota, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain upon request of the American Federation of Government Employees, AFL-CIO, or its authorized representative, American Federation of Government Employees, Local 3884, concerning the safe handling of chemotherapeutic agents by bargaining unit employees.

(b) Implementing a change in conditions of employment of bargaining unit employees represented by the American Federation of Government Employees, AFL-CIO, without first bargaining, upon request, with the American Federation of Government Employees, AFL-CIO, or its authorized representative, American Federation of Government Employees, Local 3884, concerning guidelines for the safe handling of chemotherapeutic agents.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Notify the American Federation of Government Employees, AFL-CIO, or its authorized representative, American Federation of Government Employees, Local 3884, of any proposed change in conditions of employment concerning the safe handling of chemotherapeutic agents by bargaining unit employees, and, upon request, bargain concerning such change to the extent it is not inconsistent with any Federal law or any Government-wide rule or regulation.

(b) Post at its facility at Fargo, North Dakota, copies of the attached Notice To All Employees on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Veterans Administration Medical and Regional Office Center, Fargo, North Dakota, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply with the Order.

Issued, Washington, D.C. November 12, 1986.

J. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(24 FLRA No. 3)

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to bargain upon request of the American Federation of Government Employees, AFL-CIO, or its authorized representative, American Federation of Government Employees, Local 3884, concerning the safe handling of chemotherapeutic agents by bargaining unit employees.

WE WILL NOT implement a change in conditions of employment of bargaining unit employees represented by the American Federation of Government Employees, AFL-CIO, without first bargaining, upon request, with the American Federation of Government Employees, AFL-CIO, or its authorized representative, the American Federation of Government Employees, Local 3884, concerning guidelines for the safe handling of chemotherapeutic agents.

WE WILL notify the American Federation of Government Employees, AFL-CIO, or its authorized representative, the American Federation of Government Employees, Local 3884, of any proposed change in conditions of employment concerning the safe handling of chemotherapeutic agents by bargaining unit employees, and, upon request, bargain concerning such change to the extent it is not inconsistent with any Federal law or any Government-wide rule or regulation.

WE WILL not in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

____
(Activity)

Dated: ____________________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VII, Federal Labor Relations Authority, whose address is: 535 16th Street, Suite 310, Denver, Colorado 80202 and whose telephone number is: (303) 837-5224 or FTS 8-564-5224.

(24 FLRA No. 3)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

VETERANS ADMINISTRATION,
WASHINGTON, D.C.

and

VETERANS ADMINISTRATION MEDICAL
AND REGIONAL OFFICE CENTER,
FARGO, NORTH DAKOTA

Respondents

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party/Union

Case No. 7-CA-40438

. . . .

Branson H. Moore,
For the Respondents

Cathy A. Auble and
Joseph Swerdzewski,
For the General Counsel,
Federal Labor Relations Authority

Larney Werth,
For the Charging Party

Before: ISABELLE R. CAPPELLO
Administrative Law Judge

DECISION

This is a proceeding under Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1191, 5 U.S.C. 7101 et seq. (1982), commonly known as the Federal Service Labor-Management Relations Statute, and hereinafter referred to as the Statute, and the rules and regulations issued thereunder and published at 5 CFR 2411 et seq.

Pursuant to a charge of unfair labor practices under the Statute, filed on May 3, 1984, and amended on July 23, the Regional Director for Region VII of the Federal Labor Relations Authority (hereinafter, the Authority) investigated and, on July 31, issued the complaint initiating this proceeding.

The complaint alleges that the Veterans Administration, Washington, D.C. (hereinafter, VA DC) and the Veterans Administration Medical and Regional Office Center, Fargo, North Dakota (hereinafter VA Fargo) have engaged in, and are engaging in, unfair labor practices within the meaning of Section 7116(a)(1) and (5) of the Statute.[1] The complaint specifically alleges that on or about March 5, 1984, Respondents through its agent David C. Engstrom at Respondents' Fargo, North Dakota facility, failed or refused, and have continued to refuse to bargain, upon request, with the Union concerning the Respondents' proposed guidelines for the safe handling of chemotherapeutic agents. The complaint further specifically alleges that on or about April 2, 1984, Respondents, through their agent F.E. Gathman, at Respondents' Fargo, North Dakota facility, unilaterally implemented policy guidelines concerning the safe handling of chemotherapeutic agents by bargaining unit employees without bargaining with the Union over such changes in conditions of employment.

On or about August 13, 1984, Respondents filed an answer to the complaint, substantially denying its allegations of unfair labor practices.

On September 20, 1984, a hearing was held in Fargo, North Dakota. The parties appeared, introduced documentary evidence and examined witnesses. Briefs were filed on November 9 by the Respondents and the General Counsel pursuant to an order of October 18 extending the briefing time to said date, for good cause shown and upon the unopposed request of Respondents. Based upon the record made in this case, my observation of the demeanor of the witnesses, and the briefs, I enter the following findings of fact and conclusions of law, and recommend the entry of the following order.

---

[1] Section 7116 provides, in pertinent part, that:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency -
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; . . . [or]
>
> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter . . . .

Findings of Fact[2]

1. At all times material herein, the Union has been, and is a labor organization within the meaning of section 7103(a)(4) of the Statute, and Local 3884 has been, and is its affiliate and agent.

2a. On February 28, 1980, the Union was certified as the exclusive representative of a national consolidated unit consisting of certain professional employees of Respondent Washington, D.C.

b. On July 23, 1981, registered nurses, among others, employed at VA Fargo were included in the unit.

3a. At all times material herein, VA DC and the Union have been parties to a national Interim Memorandum of Agreement covering the employees in the unit described in finding 2, above.

b. At all times material herein, VA Fargo, and the Union, have been subject to the terms and conditions of a collective bargaining agreement covering the employees in the unit described in finding 2b, above, (effective July 3, 1974 and amended on December 30, 1976) between VA Fargo and the North Dakota Nurses' Association, the Union's predecessor, as the exclusive representative of the unit described in finding 2b, above. This agreement provides for grievance and arbitration procedures.

4a. At all times material herein, Respondents are, and have been agencies within the meaning of Section 7103(a)(3) of the Statute.

b. At all times material herein F.E. Gathman has occupied the position of Center Director, at Respondents' facility located in Fargo, North Dakota, and has been, and is now, a management official or supervisor within the meaning of Sections 7103(a)(10) and/or (11) of the Statute, and an agent of Respondents.

c. At all times material herein, Dr. David C. Engstrom has occupied the position of Chief of Staff, at Respondents' facility located in Fargo, North Dakota, and has been, and is now, a management official or supervisor within the meaning of Sections 7103(a)(10) and/or (11) of the Statute, and an agent of Respondents.

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[2] The following abbreviations will be used herein. "Tr." refers to the transcript. "G.C. Exh. refers to the exhibits of the General Counsel and "R. Exh." to those of Respondents. "G.C. Br." refers to the brief of the General Counsel and "R. Br." to that of Respondents.

Corrections to the transcript appear in Appendix A to this decision. They are made pursuant to 5 C.F.R. 2423.19(r) and the unopposed motion of the General Counsel.

5. Chemotherapy is the treatment of cancer by means of a family of drugs known as chemotherapeutic or antineoplastic agents and referred to as "chemo." Although physicians occasionally give chemo, registered nurses (RNs) have been responsible for administering chemo on a continuous basis since 1976. Of the 80 RNs at VA Fargo's facility who might have an opportunity to give chemo, 20 to 25 administer chemo on a regular basis. While 16 different kinds of chemo are used at VA Fargo's facility, 7 types are most frequently administered, such as Cytoxan. Chemo can be administered either orally, or with a syringe and needle into a patient's vein or muscle, or under a patient's skin.

6. While chemo may cure a patient's cancer, chemo can later cause other problems for the same patient. Recent research has shown that health hazards also exist for the person who administers chemo. Such health hazards include defects in unborn babies (such as malformed skulls and hearts), miscarriages, premature births, as well as complaints of itching, facial flushing, hair loss, headaches, nausea, and vomiting. A test was developed (Ames Test) to measure mutagenic changes (permanent, inheritable chromosomal changes) detected in the urine of persons who have handled chemo. Two separate studies were conducted using the Ames Test. One study involved RNs who administered chemo without any safety precautions; the other study concerned pharmacists who prepared chemo for administration but who wore protective gloves, gowns and goggles. None of the pharmacists had any mutagenic changes in their urine; but all of the nurses studied showed such mutagenic changes. The January 1984 issues of The Lancet Medical Journal reported that a so-called Hirst Study demonstrated that Cytoxan is absorbed through the skin, causing mutagenic changes in the administrator's urine, with the long-term effects from repeated exposure be the handler to Cytoxan being the development of bladder cancer.

7. In 1982, Larney Werth, President of Local 3884, first learned of health hazards to RNs who administer chemo and asked VA Fargo's Chief of Staff, Dr. Engstrom, to address the health and safety aspects of RN administration of chemo, which Dr. Engstrom agreed to do. Subsequently, Dr. Engstrom went to the Environmental Control Committee (ECC) at VA Fargo's facility and asked its chairman to look for other policies in other hospitals which could be used as a starting point to develop a policy for VA Fargo. Dr. Engstrom also talked about the problem with Anne Doyle, who is an RN who administers chemo and has been the out-patient oncology (cancer) nurse since May 1982. Dr. Engstrom furnished literature on the subject to Ms. Doyle. Ms. Doyle is Treasurer of Local 3884.

8. On September 13, 1983, Ms. Doyle sent a letter to the ECC expressing her concerns, as an Oncology Nurse, regarding the need for a policy concerning the safe handling and administration of chemo. See R.

Exh. 1(a).[3] Receiving no response, she sent a letter to Dr. Engstrom on November 22, raising the same concerns and signing both as "Oncology Nurse" and "Union Treasurer." Dr. Engstrom responded and informed her that her concerns would be forwarded to the ECC for consideration.

9. In a letter dated December 7, 1983, to Dr. Engstrom, signed by Ms. Doyle as both "Oncology Nurse" and "Union Treasurer," she requested bargaining over her concerns expressed in her earlier letters. She claimed they should be viewed "as Union mid-term bargaining proposals." See R. Exh. 1(a) and also G.C. Exh. 17(a), para. 3 and Tr. 12, 139 and 140.

10. Ms. Doyle became a member of the Ad Hoc Committee of ECC and, on December 8, 1983, attended a committee meeting, along with a Union steward. At the outset, she and the steward indicated that they were attending as Union officials, in the event the committee intended to finalize any guidelines over the safe handling of chemo. Both Union officials were allowed to present and discuss fully their concerns on the matter at the meeting.

11. On December 13, 1983, the Union requested bargaining over its proposals on the safe handling of chemo by RNs. See G.C. Exh. 17(a). On December 15, the request was denied by Dr. Engstrom, claiming that union-initiated proposals for midterm bargaining were not negotiable. Referring apparently to the Ad Hoc Committee of ECC and its meeting on December 8, Dr. Engstrom stated that Ms. Doyle was not invited as a representative of the Union, but as an interested party in terms of being an RN who was "the author of the proposal" considered by the committee (G.C. Exh. 17(a)). Dr. Engstrom denied that the referral by him to the committee was to bury the subject; that the committee had no authority to sign off on a policy; and that "[s]hould a policy evolve out of the present proposal, it will be sent to the Union for comment" (G.C. Exh. 17(b).

12. Eventually the ECC adopted most of Ms. Doyle's proposals and sent them to Dr. Engstrom, who, in turn sent the proposed policy to the Clinical Executive Board (CEB) and asked for its support. The CEB did not support it. From the CEB, the proposed policy went to Director Gathman, who "put [it] out" (Tr. 124). It was "an almost exact replica of the Union's proposals" (R. Exh. 2(a).

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[3] R. Exh. 1 was received into evidence without objection. See Tr. 5. It is a letter to Mr. Werth from the Authority's Region VII Director, in which she refused to issue a complaint on a charge filed by him because it was deemed to be "premature." (R. Exh. 1(b)). The facts in findings 8, 9, and 10 are based on the investigation made by Region VII and as stated in this letter. No evidence disputing those facts was presented at the hearing.

13. On or about February 2, 1984, VA Fargo, through Dr. Engstrom, forwarded the proposed policy guidelines for the safe handling of chemo to Local 3884. On or about February 3, Local 3884 requested bargaining on the proposed guidelines. Several dates for bargaining suggested by Local 3884, February 6 and 13, were apparently not satisfactory to management. See R. Exh. 2.

14. On February 21, 1984, the parties met in a bargaining session that lasted from about 3:30 p.m. to about 4:15 p.m. Representing Respondent were Dr. Engstrom, Ray Johnson, the Chief of Personnel Services, and Irene Bloom, Chief of Nursing Services. Representing Local 3884 were Mr. Werth, Ms. Doyle, and Sue Flom, a steward in the unit which has the most chemo on it. At this meeting, Local 3884 made 18 proposals and explained them. Of the 18 proposals, the General Counsel asserts that "9 of the proposals are negotiable" (Tr. 10). The 9 are set forth in findings 15 through 23, inclusive. See Tr. 10 and G.C. 9.

15. Local 3884's proposal 1(A) provides that:

> The employee shall, consistent with the provisions contained in Section 19 of the Occupational Safety and Health Act 1970, Executive Order 12196, 29 CFR 1960, and all applicable laws, rules and regulations be responsible for furnishing to and maintaining for his employees places and conditions of employment that are free of hazards that are causing or are likely to cause an accident, injury or illness to the employee.

See G.C. 9(a). The intent of Local 3884, in making this proposal was just to make management's proposed policy "a little bit stronger" (Tr. 32). Respondents do not allege that the proposal was non-negotiable, only that it was "unnecessary" and "serve[d] no purpose" (R. Br. 8). This proposal was discussed at the February 21 meeting of the parties. Dr. Engstrom objected that "you really can't make any working environment hazard-free" and he "object[ed] to the strength of [the] language" (Tr. 33). Local 3884's team replied that "you've got to strive towards making it as safe as possible" and "take every precaution" (Tr. 34 and see also Tr. 76-77) Dr. Engstrom agreed that safety was "an ideal we should pursue certainly." He pointed out that the facility was already subject to the standards by Federal law. He stated that "we d[o] not feel we needed to write it into our policy in the institution" (Tr. 127).

16. Local 3884's proposal 1(B) provides that:

> The union has the right to advise management concerning safety and health problems.

See G.C. 9(a). The intent of Local 3884 in proposing this was to "give [it] the right to meet with management if [it] felt there was a problem" and to "implement a procedure" for so doing (Tr. 34). Respondents do not allege that this proposal is non-negotiable, only that Union has the right and obligation to bring such matters to the attention of management and has a representative on the Health and Safety Committee who may bring such matters to the attention of management. See R. Br. 8. Ms. Doyle was denied the right about a year and a half ago, as a union representative See Tr. 78-79. Counsel for Respondents conceded that he knew of no written agreement giving the Union the right to advise management concerning safety problems. See Tr. 80. Local 3884 explained this proposal. There is no evidence that management made any comments about this proposal at the February 21 meeting. See Tr. 35, 110 and 127.

17. Local 3884's proposal 1(C) provides that:

> When a workplace inspection is conducted by the employer's safety representative or by an outside agency such as OSHA or NIOSH, the union shall be invited and encouraged to participate. During the course of any such inspection, any employee(s) may bring to the attention of the inspectors any unsafe or unhealthful working conditions.

See G.C. Exh. 9(a). The intent of Local 3884 was to have the ability to meet with these inspectors when they are onsite and to bring concerns to their attention. See Tr. 35-38. Respondents do not allege that this proposal is non-negotiable. See R. Br. 7-9. Dr. Engstrom stated, at the February 21 meeting that VA Fargo was already subject to OSHA[4] and NIOSH[5] standards so he "did not feel that [VA Fargo] needed to write it into [its] policy in the institution" (Tr. 127)[6]

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[4] "OSHA" refers to the Occupational Safety and Health Administration, Department of Labor.

[5] "NIOSH" refers to the National Institute of Occupational Safety and Health Center for Disease Control, Department of Health and Human Services.

[6] Dr. Engstrom's testimony as to what transpired at the February 21 meeting was given in an honest, straightforward manner. While he needed to refresh his memory, as to the date (Tr. 124-125), his recollection of what transpired seemed sure; and I have credited his account of management's participation at the meeting.

18. Local 3884's proposal 1(D) provides that:

> When an investigation is made of an occupational accident by anyone, the union shall be invited and encouraged to participate.

See G.C. Exh. 9(a). The intent of Local 3884 in making this proposal was for it to be "a kind of trigger mechanism" making management notify it of any accidents to one of the bargaining-unit employees while using chemo, and encouraging it to participate in the investigation (Tr. 38-39). Respondents do not allege that this is non-negotiable, only that a "procedure is already established to investigate accidents and works quite well," and to "invite additional participation could quite possibly result in delay and confusion" (R. Br. 8). There is no evidence that management made any comments concerning this proposal at the February 21 meeting.

19. Local 3884's proposal 3, first sentence, provides that:

> The employer shall acquire, maintain and require the use of approved safety equipment, approved personal protective equipment, and other devices necessary to provide protection of employees from hazardous conditions encountered during the performance of official duties.

See G.C. 9(b). The intent of Local 3884 in proposing this was to insure that management maintain the safety equipment management had agreed to acquire, to have it ready for use on the units that give chemo, and to require needles and syringes to be discarded intact and placed in a leak and puncture proof biohazard container. See Tr. 42. Respondents do not allege that this proposal is non-negotiable, only that "protective clothing is already being provided" and that it is "clear that if management provides, it will maintain" (R. Br. 8). Local 3884 explained, at the February 21 meeting, that a "lot of the hazard occurs" in the disposal of items used to administer chemo (Tr. 42). Protective equipment is currently available in the wards; but Local 3884 has no signed agreement that management will maintain it, or keep it there. See Tr. 90. At the time of the February 21 meeting, Local 3884 proposed a date by which protective equipment would be provided; and Dr. Engstrom commented that he would have "trouble with the specific date because [he] didn't know if the policy was going to be into its approved form by a specific date because there was potential not only for [him] to have to bargain this policy with [Local 3884's] bargaining unit but another bargaining unit" (Tr. 128) Local 3884's team indicated they "understood that aspect of it" (Tr. 128).

20. Local 3884's proposal 4(B) provides that:

> Management agrees to provide the where withal [sic.] to implement these proposals regarding antineoplastics no later than 3/15/84.

See G.C. Exh. 9(c). The intent here was to obtain an implementation date on a matter Local 3884 had been pursuing with management since November 1982. See Tr. 45. Respondents do not now question the negotiability of this proposal, although an indication of such a question was raised at the hearing. Compare R. Br. 7-9 with Tr. 13-14. Proposal 4(B) was mentioned at the February 21 meeting. Local 3884 said it wanted "implementation just as soon as possible" (Tr. 46). Management raised no budgetary or financial matters regarding this proposal. Dr. Engstrom again explained his problem with meeting the specific implementation date because of bargaining obligations to another union.

21. Local 3884's proposal 4(I) provides that:

> The employer shall grant official time to a designated Union official for purposes of further research on the subject of safe administration of antineoplastics for purpose of educating bargaining unit employees to their safe uses. Training programs will be coordinatedd between the A.C.N.S.E. and the Union designee. Official time shall be limited to 8 hours per week for effectuating these programs. Tuition, official time and per diem shall be provided for said Union designee to attend "outside" workshops or courses to further knowledge and expertise on the subject of safe handling of antineoplastics.

See G.C. Exh. 9(d) and Tr. 82. The intent of Local 3884 in making this proposal was to elaborate and implement management's proposal that personnel would receive special training in the handling of chemo and also refresher courses, with documentation being given that training had taken place. See Tr. 46-48. Also, Local 3884 wanted official time to do research and advise unit employees. Dr. Engstrom made the following comment on union proposal 4(I) at the February 21 meeting:

> I specifically -- this is an issue involving official time for further research in education on the subject. This was an area where I pointed out that we do have an education committee and I pointed out any of the employees of the facility can request educational time and also financial support in terms of tuition and per diem and based on availability of resources the education committee does provide those types of things and I felt this would be delving into setting up or splitting the responsibilities of the education committee as such. I also stated that in handling, since the subject of the policy was to be handling, that I had hoped to avoid discussion on on [sic.] official time as such which is an area we discussed briefly.

See Tr. 129. Although Mr. Werth could not recall any concerns raised by management as to proposals 4(I), he did not seem sure. See Tr. 48. Dr. Engstrom, on the other hand, appeared confident of this recollection.

22. Local 3884's proposal 4(J) provides that:

> As new technology develops in the area of antineoplastics safety, management and the Union shall meet at the call of either party to discuss such developments and plan together to obviate any hazards identified. This agreement shall be modified to incorporate any changes arrived at following such discussions.

See G.C. Exh. 9(e). The intent of Local 3884 was to provide a mechanism to come back to the bargaining table, if needed, as new technology developed. See Tr. 48-49. Respondents suggest that this proposal "may be a possible area which is non-negotiable under 5 U.S.C. 7106(b)(1).[7] See R. Br. 9. Respondents argue that management has the option of negotiating technology, methods, and means of performing work and that "[t]o incorporate this proposal would require negotiations every time management wished to adopt any advances made in this field," which it declined to do (R. Br. 9). As to proposal 4(J) Dr. Engstrom testified:

> I pointed out to them that regarding this issue at any time that there was a hazard identified any employee has responsibility to notify their supervisor and if the supervisor can't correct it then they have the right to go to a higher level. I felt that did not need to be contained in this policy as such because I would expect it of any such employee who recognized a hazard.

See Tr. 129-30.

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[7] 5 U.S.C. 7106(b) provides that:

Nothing in this section [Management rights] shall preclude any agency and any labor organization from negotiating --

> (1) at the election of the agency on the numbers, types, and grades of employees on positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work . . .

23. Local 3884's proposal 4(K) is as follows:

> Introduction or use of any new or different antineoplastic agent will be reported to the Union before use of said chemical is begun. (New as different to this Institution).

See G.C. Exh. 9(e). The intent of this proposal was to put a mechanism in place so that, should a new hazardous substance be introduced into the RNs workplace, management would first confer with the Union and tell them if its introduction, so that the Union "would have time to do a database, search library works, whatever is necessary to find out what the hazards are before that drug is used" (Tr. 49). Local 3884 would seek this notice after the facility's Pharmacy and Therapeutics Committee (P&TC) approved the new drugs for use at the facility. See Tr. 52-53. Local 3884 did not seek "veto power" over the introduction of new drugs into the hospital (Tr. 83-84). It did want a report before those chemicals were begun, in order to prepare for any hazards. Respondents argue, as to this proposal that:

> The hospital has a pharmacy and therapeutic committee which has a responsibility to pass on new drugs coming into use in the Medical Center. The union proposal would erode and abrogate a portion of the function of that committee.

See R. Br. 9. Dr. Engstrom discussed the fact that, in his view, he was in no position to negotiate away the responsibility of the P&TC in determining whether or not we would put a drug in the "formulary," which is a list of drugs available for use on a regular basis. See Tr. 130.

24. At the February 21, 1984, meeting the union representatives expressly stated that: "We wanted biohazard bags" and all equipment contaminated with chemo placed in that bag (Tr. 109 and see also Tr. 42). Management's proposal, at the time of the February 21 meeting, provided for disposal in bio-hazard bags. See G.C. Exh. 5(c), para C2.

25. After the discussions set forth in findings 15-24 inclusive, and before the February 21, 1984 meeting ended, Dr. Engstrom asked for a copy of the union proposals. See Tr. 28 and 130. Mr. Werth replied that it was "a partial proposal, that there would probably be more" (Tr. 130). Ms. Doyle stated that she wished to put the union proposals in a typewritten format because she felt that it was "not well structured and not completed at that time" (Tr. 130). The union representatives told Dr. Engstrom he would have "a typewritten copy of their proposals by the following Tuesday" (Tr. 131). (February 21, 1984, fell on a Tuesday.) No proposals were signed or initialed off at this meeting. See Tr. 28 and 111. Dr. Engstrom concluded the meeting by stating that "he would arrange for the next megotiating session, he would let the Union know the time and place for the next session" (Tr. 28).

26. On Tuesday, February 28, 1984, Local 3884 forwarded a copy of its proposals to Dr. Engstrom, with the caveat: "Not necessarily bound to all these proposals at this time;" and "Partial List of Proposals Including Most Substantive Matters." (G.C. 9(e)). The copy appears to be patched-up compilation of typed and handwritten material. Dr. Engstrom saw the caveat at the February 21 meeting. See Tr. 163. He had expected to see new proposals, but found none in the copy forwarded to him on February 28. See Tr. 131-132 and 162-163.

27. Dr. Engstrom compared Local 3884's proposals with the original proposed policy, and made what he called "relatively minor changes" (Tr. 132). One change was to delete the adjective "bio-hazard" from the original proposed policy. See Tr. 149 and compare paragraph C2 of G.C. Exh. 5(c), the management proposal discussed at the February 21 meeting, with the same paragraph in G.C. Exh. 10(c), the alteration made by Dr. Engstrom after receiving the copy of Local 3884's proposals in February 28, and with the same paragraph of G.C. Exh. 13(b), the policy finally implemented. As found in finding 24, above, Local 3884 explicated the need for "bio-hazard" bags at the February 21 meeting and never proposed that this word be removed from the policy. See Tr. 54 and 110. Other changes made were minor in nature, at least one having been proposed by Local 3884 at the February 21 meeting. See Tr. 150.

28. By a March 2, 1984, cover memorandum, Dr. Engstrom forwarded the revised policy to Local 3884. Dr. Engstrom stated that a majority of the Local's proposals did not address the policy and that Respondent VA Fargo had incorporated some of the Local's "suggested wording" (G.C. 10). That same day, Local 3884 responded by memorandum asking Dr. Engstrom to either counter-propose, or to declare the Local's proposals non-negotiable, and stating that Local 3884 awaited Dr. Engstrom's suggestion for the next bargaining session. See G.C. Exh. 11.

29. On March 5, 1984, Dr. Engstrom sent the following memorandum to Ms. Doyle:

> 1. Your comment was solicited and considered regarding the policy for "Guidelines for Safe Handling of Chemotherapeutic Agents."
>
> 2. Once your written proposal was provided it was reviewed and the policy was altered in its wording where the policy was addressed.
>
> 3. Sections 1, 2, 3 are considered to be midterm bargaining and are not appropriate.
>
> 4. The views and recommendations from Section 4 have been duly noted and incorporated, where

> applicable. It is not within the scope of the proposed policy to discuss such things as (a) official time, (b) AFGE continuing education and its funding, (c) abrogation of the P&T Committee or education committees, (d) or employees right to refuse duties.
>
> 5. In closing, proposed policies and changes are submitted to Local 3884 for review and comment in accordance with CSRA 7117d 1, 2, and 3.
>
> 6. Views and recommendations should be confined to the proposed policy, circular, etc. At this time the revised "Guidelines for Safe Handling of Chemotherapeutic Agents" will be forwarded to NFFE Local 225 for review and comment in accordance with the above and following that, will be forwarded to the Director for issuance.

See G.C. 12. Use of the term "not appropriate" by management has, in the past, been a signal to Local 3884 that management refuses to discuss the matter any further; and this was the intent of Dr. Engstrom here. See Tr. 57-59 and 156-157. Mr. Werth understood the use of the terms "views and recommendations" being "noted" as meaning that management would listen to Local 3884, but was not obligated to bargain over its proposals. Use of the citation to "CSRA 7117d 1, 2, and 3" reinforced this view of Local 3884, since that portion of the Statute deals with "consultation rights" of labor organizations which are not certified as the exclusive bargaining representative of a majority of the employees (as is the Union here) and does limit the labor organization to presenting only "views and recommendations" which an agency shall merely "consider" before taking final action. See 5 U.S.C. 7117(d)(1), (2) and (3). Dr. Engstrom testified that he later discovered he had cited the wrong statutory provision, but he did not so inform Local 3884, even though he realized that Local 3884 probably understood this wrong citation to demonstrate that VA Fargo was willing only to consult. See Tr. 155-156. Local 3884 did so construe the memorandum and also understood that no further bargaining would occur. See Tr. 65. It therefore did not seek further bargaining on the proposed policy. Dr. Engstrom testified that he did, indeed, intend no further bargaining with the union team "[u]nless they came up with another issue" (Tr. 161).

30. On April 2, 1984, VA Fargo implemented the policy at its facility. See G.C. Exh. 3. Other than the addition of "Purpose" and "Procedures" headings, the implemented policy was no different from the March 2 revision of the proposed policy.

Discussion and Conclusions

The General Counsel has established, by a preponderance of the evidence,[8] that Respondents have failed and refused to bargain in good faith with the Union over negotiable proposals and unilaterally implemented policy guidelines on the safe handling of antineoplastics agents (chemo) by bargaining-unit employees.

1. Respondents contest only the negotiability of one union proposal at issue here. See R. Br. 7-9. Putting that particular proposal aside, all the rest concern the health and safety of bargaining-unit employees, RNs, while performing their duties -- namely the safe handling of chemo in administering it to cancer patients. See findings 15-21, inclusive and 23, above. Undisputedly, chemo that is not safely handled presents serious health hazards to RNs. See finding 6, above. Thus, the proposals "concern matters directly affecting 'the work situation and employment relationship' of bargaining unit employees [and are] within the duty to bargain." See National Federation of Federal Employees, Local 1363, 12 FLRA 635, 636 (1983). None appear, or are claimed to infringe upon any management right. Thus, the union had some negotiable proposals on the bargaining table at the time the alleged failure to bargain in good faith, and unilateral implementation occurred, as will be now discussed.[9]

2. Whether there has been a failure of good faith bargaining is measured by certain criteria set by the Statute and established by case precedent. First of all, "the totality of the evidence" is considered, and the actions of the parties viewed in the context in which the negotiations arose. See Division of Military and Naval Affairs, State of New York (Albany, New York), 7 FLRA 321, 338 (1981, hereinafter referred to as DMN). Considered also is whether the parties approached the negotiations with a sincere resolve to reach a collective bargaining agreement; were represented by duly authorized representatives prepared to discuss and negotiate on any condition of employment; met as frequently as

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[8] This is the statutory burden of proof. See Sections 7118(a)(7) and (8) of the Statute.

[9] The one proposal questioned by Respondents is number 4(J), which would require the parties to "plan together" over any new "technology" developed in the area of chemo safety, in order to "obviate any hazards identified." See finding 22, above. Respondents argue that this proposals interferes with their right to bargain over "the technology of performing work" only at their election. See R. Br. 9 and Section 7106(b) of the Statute, quoted in footnote 7, above. As the proposal is presently worded, this objection appears to be valid.

was necessary; and avoided unnecessary delays. See DMN, id. at 321 and Section 7114(b) of the Statute, defining the bargaining obligations of the parties in these terms. Exploring and discussing each others' positions "embodies the very essence of negotiations as envisioned by the Statute." See Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, North Atlantic Region, (New York, New York), 8 FLRA 296, 304 (1982, hereinafter DOT). Requirements for stylized forms of communication are to be eschewed. See DOT, ibid, referring to no requirement that a union "must make a specific proposal and that discussions must somehow always lead to a written contract . . . ." An employer's failure to submit counterproposals is not generally regarded as a per se violation of the duty to bargain in good faith. See N.L.R.B. v. Arkansas Rice Growers Cooperative Ass'n, 400 F.2d 565, 571 (8th Cir. 1968), a decision by the Federal agency which resolves labor disputes in the private sector. The fact that intra-agency memorandums may speak in terms of "an obligation to consult, rather than negotiate" is not controlling, if the totality of the agency's conduct indicates that it did, in fact, bargain. See Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 16 FLRA 217, 228-229 (1984), hereinafter DHHS).

3. The record in this case has been reviewed using the above-stated criteria. It reveals the following indications that bargaining as to the concerns at issue fell short of the statutory obligation imposed upon management.

First of all, management proceeded at a snail's space in formulating a solution to the serious concerns raised by the Union. The Union first broached these concerns with the Chief of Staff at VA Fargo in November 1982 and asked that the matter be addressed. Management referred the matter to a committee, where it apparently languished. By September 1983, the matter was still dragging on; and the Union Treasurer prodded the committee. Upon receiving no response, the Union prodded the Chief Staff, on November 22, and set forth its concerns. The Chief of Staff referred the concerns to the same committee. Again, on December 7, the Union raised the matter with the Chief of Staff, requested bargaining over the concerns, which it delineated as proposals. Finally, a union representative was invited to a meeting of the committee, held on December 8. There the union representative pressed for a resolution of union concerns. On December 13, the Union again sought to bargain over its proposals. This request was denied, on December 15, on the ground that union-initiated proposals for mid-term bargaining were not negotiable and that "[s]hould a policy evolve out of the present proposals, it w[ould] be sent to the Union for comment." See finding 11, above. Eventually, a policy did evolve out of the committee, and was sent to another committee, which did not support it. It was not until February 2, 1984, that management forwarded the proposed policy guidelines to the Union -- over a year after the Union broached the subject to the Chief of Staff at VA

Fargo. The proposed policy was almost an exact replica of what the Union had proposed some three months earlier, on November 22, 1983. Management then had trouble finding a satisfactory date to meet with the Union, and did not finally meet with the Union until February 21, 1984.

The February 21, 1984, meeting was the only face-to-face "bargaining" session of the parties; and it was more in the nature of a meeting where the Union explained its proposals and management made brief comments and objections as to some of the proposals, but none as to two of the negotiable ones. See findings 16 and 18, above. No give-and-take negotiations typical of bargaining sessions occurred. No written agreements were entered. The meeting concluded in less than an hour with both parties expecting management to set another meeting after the Union had submitted its proposals in a typewritten format.

No such meeting was ever set because, when management received the Union's typewritten proposals, it found no new ones. And as to old ones, "the basic objections of management were that the bulk of [them] were addressed in other policies or by committees already in place and functioning" (R. Br. 8). Here, Respondents display a basic misunderstanding of the meaning of the collective bargaining process. True, policies and committees may be in place today; but without an agreement between the parties that they stay in place, they could be gone tomorrow. With an agreement, the union is assured that they will remain in place for the life of the agreement, and that any dispute concerning the agreed-upon policies and committees will be subject to the grievance and arbitration procedures of the collective bargaining agreement that binds the parties. The parties here have such an agreement. See finding 3b, above.

After the February 21, 1984, meeting, management made some admittedly "[m]inor changes in its proposed policy guidelines on the safe handling of chemo" (R. Br. 7); but it also dropped the word "biohazard" as the type of bag into which contaminated material would be placed -- not at all a "minor" change, but one on which the Union had explicated the need at the February 21, 1984, meeting. See findings 24 and 27, above. These changes were forwarded to the Union on March 2 and drew an immediate Union response demanding counter-proposals or a declaration of non-negotiability and stating that the Union awaited the next bargaining session.

On March 5, 1984, management sent the Union a letter clearly indicating that management had considered all the Union's comments, had made such changes as it intended to make, and would implement the policy as soon as another union had had a chance to review and comment on the policy guidelines. See finding 29, above. Management's miscitation, in the letter, of the section of the Statute under which it stated that it submitted proposed policies to the Union, admittedly led the Union to believe that management would listen to the Union, but did not feel obligated to bargain with it. At this point, the Union gave up and sought no further bargaining.

On April 2, 1984, VA Fargo implemented the policy guidelines without ever discussing some of the Union's proposals, and without bargaining over the dropping of the requirement for biohazard bags from the management proposals it had met with the Union about on February 21. While an agency is "free to impose changes not exceeding its proposals after bargaining to impasse with the union" (DHHS, 16 FLRA at 229), it is not free to change the proposals which were the subject of the bargaining effort. And the fact that the Union did have "great impact in formulating" the policy guidelines does not mean that some of its negotiable proposals may be ignored, as Respondents seem to think. See R. Br. 6.

4. In addition to the usual cease-and-desist, bargaining, and notice-posting order, the General Counsel seeks an order that Respondents give retroactive application to any agreements reached. See G.C. Br. 21. The General Counsel stresses the fact that the union proposals made were specific and, thus, their retroactive effect capable of discernment. For example, the Union has been denied the right to notice of safety inspections and accident investigations and the right to participate therein. See findings 17 and 18, above. Notification to the Union, even months after safety inspections and accident investigations, would allow it to identify matters it could address on behalf of unit employees and to monitor compliance procedures. The Union has also been denied the right to official time, tuition costs, and per diem for researching and training in chemo-related matters. See finding 21, above. This could all be restored. The Union has also been precluded from learning of the institution of new chemo. See finding 23, above. It is not too late for Respondents to advise the Union of this so that it can research any related health and safety problems to determine what action, if any, it should pursue in representing the best interests of unit employees. Under these circumstances, retroactive relief is deemed to be appropriate, and in the public interest, and the complete relief sought by the General Counsel should be granted. Compare, Department of the Treasury, U.S. Customs Service, Region VIII, San Francisco, California and National Treasury Employees Union, 9 FLRA 606, 608, fn. 3 (1982), which denied retroactive application where the effects would be "speculative" in terms of identifying employees entitled to lost overtime. Compare also Environmental Protection Agency, 16 FLRA 602 (1984) where retroactive application was denied in a case where the union had submitted only ground rules, and no specific substantive proposals. See 16 FLRA at 611. Compare also Internal Revenue Service, 16 FLRA 845, 846, 863 (1984) where retroactive relief was denied apparently because the unilateral change and failure to bargain involved only a temporary program. Compare also, Internal Revenue Service, 16 FLRA 907 (1984), affirming a decision of Administrative Law Judge Salvatore J. Arrigo, that the parties might find themselves before the Federal Services Impasses Panel (FSIP) to which the parties had already been (16 FLRA at 915-917), and therefore an order requiring retroactive application "would limit the requisite flexibility

and impair the broad range of options the FSIP necessarily requires to execute its statutory functions" (16 FLRA at 924). These cited cases are all distinguishable from the one here at issue.

Ultimate Findings and Recommended Order

Respondents have violated, and are violating Sections 7116(a)(1) and (5), as alleged in the complaint.

Accordingly, and pursuant to 5 CFR 2423.29 and Section 7118 of the Statute, the Authority hereby orders that the Veterans Administration, Washington, D.C. and Veterans Administration Medical and Regional Office Center, Fargo, North Dakota, shall:

1. Cease and desist from:

   (a) Failing and refusing to bargain upon request of the American Federation of Government Employees, AFL-CIO, or its authorized representative, American Federation of Government Employees, Local 3884, concerning the safe handling of chemotherapeutic agents by bargaining unit employees.

   (b) Implementing a change in conditions of employment of bargaining unit employees represented by the American Federation of Government Employees, AFL-CIO, without first bargaining, upon request, with the American Federation of Government Employees, AFL-CIO, or its authorized representative, American Federation of Government Employees, Local 3884, concerning guidelines for the safe handling of chemotherapeutic agents.

   (c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

   (a) Notify the American Federation of Government Employees, AFL-CIO, or its authorized representative, American Federation of Government Employees, Local 3884, of any proposed change in conditions of employment concerning the safe handling of chemotherapeutic agents by bargaining unit employees, and, upon request, bargain concerning such change.

(b) Apply retroactively to April 2, 1984, any agreement reached pursuant to a bargaining request made by the American Federation of Government Employees, AFL-CIO, or its authorized representative, American Federation of Government Employees, Local 3884, concerning the safe handling of chemotherapeutic agents by bargaining unit employees.

(c) Post at its facility at Fargo, North Dakota, copies of the attached Notice To All Employees on forms to be furnished by the Regional Director, Region VII, Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Director of the Veterans Administration Medical and Regional Office Center, Fargo, North Dakota and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take all reasonable steps to insure that such Notices are not altered, defaced, or covered by other material.

(d) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Isabelle R. Cappello

ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: March 27, 1985
Washington, D.C.

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain, upon request of the American Federation of Government Employees, AFL-CIO, or its authorized representative, American Federation of Government Employees, Local 3884, concerning the safe handling of chemotherapeutic agents by bargaining unit employees.

WE WILL NOT implement a change in conditions of employment of bargaining unit employees represented by the American Federation of Government Employees, AFL-CIO, without bargaining, upon request, with this representative or its authorized representative, the American Federation of Government Employees, Local 3884, concerning guidelines for the handling of chemotherapeutic agents.

WE WILL notify the American Federation of Government Employees, AFL-CIO, or its authorized representative, American Federation of Government Employees, Local 3884, of any proposed change in conditions of employment concerning the safe handling of chemotherapeutic agents by bargaining unit employees, and, upon request, bargain concerning such change.

WE WILL apply retroactively, to April 2, 1984, any agreement reached pursuant to a bargaining request made by the American Federation of Government Employees, AFL-CIO, or its authorized representative, American Federation of Government Employees, Local 3884, concerning the safe handling of chemotherapeutic agents by bargaining unit employees.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

(Agency or Activity)

Dated: ________________ By: ____________________

(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VII, whose address is: 1531 Stout Street, Suite 301, Denver, Colorado 80202 and whose telephone number is: (303) 837-5224 or FTS-8-564-5224.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

PHILADELPHIA NAVAL SHIPYARD

Respondent

and Case No. 2-CA-40243
(19 FLRA No. 107)

PHILADELPHIA METAL TRADES COUNCIL

Charging Party

DECISION AND ORDER ON REMAND

I. Statement of the Case

This case is before the Authority pursuant to a remand from the United States Court of Appeals for the District of Columbia Circuit. The question before the Authority is whether it is an unfair labor practice under the Federal Service Labor-Management Relations Statute (the Statute) for the Respondent (Agency) to refuse a request, made pursuant to section 7114(b)(4) of the Statute, to provide the Charging Party (Union) with the names and home addresses of employees in a bargaining unit which the Union exclusively represents.

In a recent Decision and Order on Remand in another case, Farmers Home Administration Finance Office, St. Louis, Missouri, 23 FLRA No. 101 (1986) (FHAFO), we reviewed the Authority's previous decision concerning the release of the names and home addresses of bargaining unit employees to exclusive representatives. We concluded that the release of the information is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets all of the other requirements established by section 7114(b)(4). We also determined that the release of the information is generally required without regard to whether alternative means of communication are available . Consistent with our decision on remand in FHAFO, we conclude that Respondent's refusal to provide the Union with the names and home addresses sought in this case violated section 7116(a)(1), (5) and (8) of the Statute. We therefore vacate the Authority's previous decision in this case.

II. Facts

The Union requested the names and home addresses of the unit employees it represents. The Respondent denied the request. The Respondent took the position that release of the information was not necessary because the Union had adequate alternative means available for communicating with the unit employees through Union stewards, bulletin boards, publication of items in the Respondent's newspaper, and distribution of literature within the Shipyard.

III. Administrative Law Judge's Decision

The Judge concluded that the Respondent failed to comply with the requirements of section 7114(b)(4) of the Statute in violation of section 7116(a)(1), (5) and (8) of the Statute when it refused to provide the Union, upon request, with the names and home addresses of all unit employees represented by the exclusive representative. The Judge found that an exclusive representative must be able to communicate effectively with its constituency; that the exclusive representative's access to the addresses of unit employees was necessary for it to carry out its representational responsibilities in collective bargaining because it had no other effective means of communication with the employees; and that the Privacy Act*/ was not a bar to disclosure of the information.

IV. Positions of the Parties

The parties' positions were set forth in the Respondent's exceptions and the General Counsel's response in the original case. The Respondent contended that it acted properly in denying the Union's request for the names and home addresses of employees because the Union's request did not specify why home addresses were necessary within the meaning of section 7114(b)(4). The Respondent maintained that a request which states that home addresses are necessary because such information will enable the Union to better perform its general representational responsibilities is not specific enough to warrant the release of home addresses. The Respondent also contended that the Union had other appropriate means available for communicating with unit employees, and it excepted to the Judge's conclusion that the alternative means were inadequate. Finally, the Respondent argued that the disclosure of home addresses would constitute an invasion of employee privacy in violation of the Privacy Act.

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*/ Privacy Act of 1974, 5 U.S.C. § 552a (1982).

The Counsel for the General Counsel argued that the factual and legal conclusions of the Judge were correct and urged the Authority to affirm the Judge's decision.

V. Previous Decision of the Authority

In its previous decision in this case, Philadelphia Naval Shipyard, 19 FLRA No. 107 (1985), the Authority followed the precedent established in the original FHAFO case, 19 FLRA No. 21 (1985). The Authority concluded that the release of home addresses was not required pursuant to section 7114(b)(4) of the Statute because the disclosure of such information was "prohibited by law," specifically the Privacy Act. The Union appealed. Philadelphia Metal Trades Council v. FLRA, No. 85-1625 (D.C. Cir.). The Authority requested that the court remand the case. The Authority also sought remand from the courts in FHAFO and two other cases which had been appealed and presented substantially identical issues. The courts granted the Authority's requests in the FHAFO case, American Federation of Government Employees, Local 3354 v. FLRA, No. 85-1493 (D.C. Cir.) (reviewing 19 FLRA No. 21); in National Federation of Federal Employees, Local 1827 v. FLRA, No. 85-2202 (8th Cir.) (reviewing 19 FLRA No. 85); and in this case. The U.S. Court of Appeals for the Second Circuit, however, denied the Authority's remand request in one case, Social Security Administration, Northeastern Program Service Center, 19 FLRA No. 108 (1985), and issued a decision. The Second Circuit reversed the Authority's holding that the release of names and home addresses was "prohibited by law," i.e., the Privacy Act, under section 7114(b)(4) of the Statute. American Federation of Government Employees, Local 1760 v. FLRA, 786 F.2d 554 (2nd Cir. 1986). The Authority then decided to review the entire issue of the release of employees' names and home addresses and invited agencies, unions, and interested persons to submit amicus briefs addressing the issue. A number of amicus submissions were received. Although the parties in this case did not submit amicus briefs, the Navy Department and the American Federation of Government Employees did file amicus briefs outlining their positions.

VI. Analysis and Conclusion

As noted above, the Authority in the decision on remand in FHAFO concluded that the release of the names and home addresses of bargaining unit employees to the exclusive representative of those employees is not prohibited by law, is necessary for unions to fulfill their duties under the

Statute and meets the other requirements of section 7114(b)(4). We also determined that agencies are required to furnish such information without regard to whether alternative means of communication are available or adequate. Based on our decision on remand in the FHAFO case, we find that the Respondent in this case was required to furnish the Union with the names and home addresses of the employees in the bargaining unit. We conclude that the Respondent's refusal to furnish the requested information constituted a violation of section 7116(a)(1), (5) and (8) of the Statute.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is ordered that the Philadelphia Naval Shipyard, Philadelphia, Pennsylvania, shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request by the Philadelphia Metal Trades Council, the exclusive representative of its employees, the names and home addresses of all employees in the bargaining unit it represents.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request by the Philadelphia Metal Trades Council, the exclusive representative of its employees, furnish it with the names and home addresses of employees in the bargaining unit it represents.

(b) Post at all its facilities where bargaining unit employees represented by the Philadelphia Metal Trades Council are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a senior official of the Philadelphia Naval Shipyard, Philadelphia, Pennsylvania, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., November 13, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request by the Philadelphia Metal Trades Council, the exclusive representative of our employees, the names and home addresses of all employees in the bargaining unit it represents.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request by the Philadelphia Metal Trades Council, the exclusive representative of our employees, furnish it with the names and home addresses of all employees in the bargaining unit it represents.

____
(Activity)

Dated:________________ By:______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region II, Federal Labor Relations Authority, whose address is: 26 Federal Plaza, Room 3700, New York, N.Y. 10278 and whose telephone number is: (212) 264-4934.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEFENSE MAPPING AGENCY AEROSPACE
CENTER, ST. LOUIS, MISSOURI

Respondent

and

Case No. 7-CA-20482
(19 FLRA No. 85)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1827

Charging Party

DECISION AND ORDER ON REMAND

I. Statement of the Case

This case is before the Authority pursuant to a remand from the United States Court of Appeals for the Eighth Circuit. The question before the Authority is whether it is an unfair labor practice under the Federal Service Labor-Management Relations Statute (the Statute) for the Respondent (Agency) to refuse a request, made pursuant to section 7114(b)(4) of the Statute, to provide the Charging Party (Union) with the names and home addresses of employees in a bargaining unit which the Union exclusively represents.

In a recent Decision and Order on Remand in another case, Farmers Home Administration Finance Office, St. Louis, Missouri, 23 FLRA No. 101 (1986) (FHAFO), we reviewed the Authority's previous decision concerning the release of the names and home addresses of bargaining unit employees to exclusive representatives. We concluded that the release of the information is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets all of the other requirements established by section 7114(b)(4). We also determined that release of the information is generally required without regard to whether alternative means of communication are available. Consistent with our decision on remand in FHAFO, we conclude that Respondent's refusal to provide the Union with the names and home addresses sought in this case violated section 7116(a)(1), (5) and (8) of the Statute. We therefore vacate the Authority's previous decision in this case.

II. Facts

The Union requested the names and home addresses of the unit employees it represented. The Respondent denied the request on the ground that the information was not maintained in a form which was reasonably available. The Respondent also contended that the home addresses in the employees' personnel records were not current, and that to retrieve the specific information from either its personnel records or its computerized payroll system would be unnecessarily costly and time consuming.

III. Administrative Law Judge's Decision

The Judge concluded that the Respondent failed to comply with the requirements of section 7114(b)(4) of the Statute in violation of section 7116(a)(1), (5) and (8) of the Statute when it refused to provide the Union, upon request, with the names and home addresses of all unit employees represented by the exclusive representative. The Judge found that: (1) the home addresses of unit employees, while not maintained in a discrete list, were available both in employees' personnel files and in the Respondent's data banks; (2) the cost of retrieving this data was not unreasonable; (3) it "seems axiomatic" that a union must be able to communicate effectively with the employees it represents; and (4) the sources of communication available to the Union were neither effective nor reasonable. The Judge concluded that the Respondent must supply the Union with names and home addresses and that the Privacy Act*/ is not a bar to such disclosure.

IV. Previous Decision of the Authority

In its previous decision in this case, Defense Mapping Agency Aerospace Center, St. Louis, Missouri, 19 FLRA No. 85 (1985), the Authority followed the precedent established in the original FHAFO case, 19 FLRA No. 21 (1985). The Authority concluded that the release of home addresses was not required pursuant to section 7114(b)(4) of the Statute because the disclosure of such information was "prohibited by law," specifically the Privacy Act. The Union appealed. National Federation of Federal Employees, Local 1827 v. FLRA, No. 85-2202 (8th Cir.). The Authority requested that the court remand the case. The Authority also sought remand from the courts in FHAFO and two other cases which had been appealed and presented substantially identical issues. The courts granted the Authority's requests in the FHAFO case, American Federation of Government Employees, Local 3354 v. FLRA, No. 85-1493 (D.C. Cir.) (reviewing 19 FLRA No. 21); in Philadelphia Metal Trades Council v. FLRA, No. 85-1625 (D.C. Cir.) (reviewing 19 FLRA No. 107); and in this case. The U.S. Court of Appeals for the Second Circuit, however, denied the Authority's remand request in one case, Social Security Administration, Northeastern Program Service Center, 19 FLRA No. 108 (1985), and issued a decision. The Second Circuit reversed the Authority's holding that the release of names and home addresses was "prohibited by law," i.e., the Privacy Act, under section 7114(b)(4) of the Statute. American Federation of Government Employees, Local 1760 v. FLRA, 786 F.2d 554 (2nd Cir. 1986). The Authority then decided to review the entire issue of the release of employees' names and home addresses and invited agencies, unions and interested persons to submit amicus briefs addressing the issue. A number of amicus submissions were received. Additionally, the Respondent in this case submitted a supplemental brief subsequent to the Eighth Circuit's remand and the Union filed a response.

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*/ Privacy Act of 1974, 5 U.S.C. § 552a (1982).

V. Positions of the Parties

In its supplemental submission, the Respondent contends that the disclosure of employees' home addresses is not permitted under the "routine use" exception of the Privacy Act, 5 U.S.C. § 552a(b)(3). The Respondent argues that the release of such information is not required by the Office of Personnel Management (OPM) in a notice published by OPM which defines the routine use of personnel records. The Respondent maintains that in determining whether release of data is a routine use, it must be shown that the release does not result in a clearly unwarranted invasion of personal privacy. The Respondent urges the Authority to find, consistent with its prior decision, that the release of home addresses in this case would constitute a clearly unwarranted invasion of personal privacy.

In its response, the Union contends that when a request is made for material contained in an employee's personnel records, the test established by OPM's routine use notice is whether such information is necessary and relevant to the Union's representational duties. The Union further urges the Authority to adopt the view of the Second Circuit in AFGE Local 1760 v. FLRA, 786 F.2d 554, that a union's need for home addresses outweighs employees' "modest" privacy interest in that information. Finally, the Union contends that the alternative means of communication available were inadequate, particularly as the Union wanted to convey a confidential message to the employees it represents and all of the alternative means of communication would give management an opportunity to see the Union's messages.

VI. Analysis and Conclusion

As noted above, the Authority in the decision on remand in FHAFO concluded that the release of the names and home addresses of bargaining unit employees to the exclusive representative of these employees is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets the other requirements of section 7114(b)(4). We also determined that agencies are required to furnish such information without regard to whether alternative means of communication are available or adequate. Based on our decision on remand in the FHAFO case, we find that the Respondent in this case was required to furnish the Union with the names and home addresses of the employees in the bargaining unit. Further in that regard, we find that the names and home addresses of the unit employees are reasonably available to the Respondent and that it would not place an undue burden on the Respondent to provide the Union with the information requested. We conclude that the Respondent's refusal to furnish the requested information in this case constituted a violation of section 7116(a)(1), (5) and (8) of the Statute.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service

Labor-Management Relations Statute, it is ordered that the Defense Mapping Agency Aerospace Center, St. Louis, Missouri, shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request by the National Federation of Federal Employees, Local 1827, the exclusive representative of its employees, the names and home addresses of all employees in the bargaining unit it represents.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request by the National Federation of Federal Employees, Local 1827, the exclusive representative of its employees, furnish it with the names and home addresses of employees in the bargaining unit it represents.

(b) Post at all its facilities where bargaining unit employees represented by the National Federation of Federal Employees, Local 1827 are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a senior official of the Defense Mapping Agency Aerospace Center, St. Louis, Missouri, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., November 13, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request by the National Federation of Federal Employees, Local 1827, the exclusive representative of our employees, the names and home addresses of all employees in the bargaining unit it represents.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request by the National Federation of Federal Employees, Local 1827, the exclusive representative of our employees, furnish it with the names and home addresses of all employees in the bargaining unit it represents.

____
(Activity)

Dated: ______________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VII, Federal Labor Relations Authority, whose address is: 535 16th Street, Suite 310, Denver, Colorado 80202 and whose telephone number is: (303) 837-5224.

24 FLRA No. 6

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

LEXINGTON-BLUE GRASS ARMY
DEPOT, LEXINGTON, KENTUCKY

Activity

and

Case No. 0-AR-1156

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 894

Union

DECISION

I. STATEMENT OF THE CASE

This case is before the Authority on an exception to the award of Arbitrator W. Scott Thomson filed on behalf of the Activity by the Department of the Army (Agency) under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The dispute in this matter resulted from the partial closure of the Lexington-Blue Grass Army Depot (Activity) on July 5, 1985, in order to conserve energy. All employees, except emergency employees and employees with personal hardships, were charged with either annual leave or leave without pay. The Union filed a grievance requesting (1) restoration of annual leave for those employees who were on annual leave or leave without pay, and (2) holiday pay for those employees who had worked. The grievance was denied on the basis that Agency regulations specifically authorized management to close installations and place employees in leave or leave without pay status as part of the overall right to manage its operation and its energy conservation program.

The Arbitrator framed the issue to be resolved as whether the partial closure was in accordance with applicable rules and regulations. The Arbitrator analyzed the pertinent provisions of the agreement and the regulations and determined that while closing an activity for managerial reasons is within the administrative authority of an agency, the authority is limited by applicable law and regulation. He interpreted Agency regulations as prohibiting the closing of an activity for the purpose of creating a holiday and, in the case of a closure to conserve energy, as requiring management to consider implementation of flex-time schedules and any other means available to avoid the need for closure. He concluded that since the Activity in this case had not considered any means of conserving energy other than closure and its decision was based in part on anticipated excessive absenteeism, the Activity had unfairly and partially treated employees and had violated applicable rules and regulations. Accordingly, as his award, the Arbitrator ordered that those employees on annual leave were to have their leave restored, and those employees on leave without pay were to receive 8 hours pay. The Arbitrator did not order compensation for those employees who worked because they were not adversely affected by the closure.

III. EXCEPTION

The Agency contends that the award is contrary to Agency regulations for which there is a compelling need. In support, the Agency cites the Authority's decision in National Association of Government Employees, Local R14-62 and U.S. Army Dugway Proving Ground, Dugway, Utah, 18 FLRA No. 38 (1985), petition for review filed sub nom. National Association of Government Employees, Local R14-62 v. FLRA, No. 85-2098 (10th Cir., July 23, 1985) (Authority motion for remand filed Nov. 11, 1986). There, the Authority found a compelling need for the same Agency-wide regulations at issue in this case: Army Civilian Personnel Regulation 990-2 (C11), subchapter 610.S3, paragraph 3C, and Department of Defense Civilian Personnel Manual Supplement 990-2, Book 610, subchapter S3, paragraph 1(a). These regulations require employees to take annual leave during periods when Agency facilities are partially closed. The Agency contends that since the same regulations are involved, the Arbitrator's award, which essentially prohibits the Agency from requiring employees to take annual leave during the periods of partial closure, is deficient under section 7122(a) of the Statute.

IV. ANALYSIS AND CONCLUSION

The Agency's exception does not establish a basis for finding the award deficient. In Aberdeen Proving Ground, Department of the Army, 21 FLRA No. 100 (1986), petition for review filed sub nom. Department of the Army, Aberdeen Proving Ground v. FLRA, No. 86-2577 (4th Cir. June 26, 1986), in the context of an unfair labor practice complaint, the Authority held that the Respondent, Department of the Army, had not established a compelling need for regulations which are to the same effect as those here, prohibiting administrative leave during periods of partial closure. The Authority made this determination because operations were curtailed in order to conserve energy, and operations would be curtailed and energy conserved to the same extent whether the affected employees were on annual leave or administrative leave during the period of partial closure. In this case, the dispute also resulted from a partial closure in order to conserve energy. The Agency has failed to demonstrate how its regulations would be essential or even helpful in achieving its objective in curtailing operations. Therefore, the Arbitrator's award does not interfere with an Agency-wide regulation for which there is a compelling need.

As to its decision in Dugway Proving Ground, the Authority found that an agency's decision to shut down or curtail operations is an aspect of management's right to layoff under section 7106(a)(1) of the Statute. Thus, we note that on occasion, financial considerations will lead management to conclude that it must exercise its authority to layoff employees. For example, if an agency is without appropriated funds, a decision to cease operations and furlough employees is clearly within management's authority to layoff employees. Moreover, if an agency receives an appropriation which is below that required to maintain a workforce at its existing level, a decision to furlough employees or to conduct a reduction-in-force is within management's authority to layoff employees. Here, the Agency does not claim, nor does it appear, that anything in the Arbitrator's award would prevent the Agency from deciding to shut down its facilities.

The Agency relies on a different aspect of the Authority's Dugway decision. In addition to the Authority's discussion of management's right to layoff, the Authority also found a compelling need for the Agency's regulations because the Agency had demonstrated, under section 2424.11(a) of the Authority's Rules and Regulations, that its regulations were a critical component in its objective of saving money by curtailing operations so as to insure the Agency's performance of its mission in an effective and efficient manner. We now reconsider and overrule the Authority's determination in Dugway Proving Ground that a demonstration of monetary savings alone is sufficient to establish that a regulation is essential, as distinguished from helpful and desirable, to the accomplishment of the mission or the execution of the functions of an agency in a manner which is consistent with the requirements of an efficient and effective Government.

We do not believe that effectiveness and efficiency are to be measured solely in monetary terms. Financial considerations, of course, can be relevant to a determination whether an agency regulation satisfies the compelling need criterion set forth in section 2424.11(a) of the Authority's regulations. See National Treasury Employees Union, Chapter 207 and FDIC, Washington, D.C., 21 FLRA No. 36 (1986) (finding a compelling need under section 2424.11(a) for agency regulations establishing a uniform system for determining employee salaries). However, in determining whether an agency's regulation is essential, as distinguished from helpful or desirable to effective and efficient agency operations, other considerations are also pertinent. Compare, for example, American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604, 608 (1980), aff'd on other grounds, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982) ("Only where an agency makes a substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits can an otherwise negotiable proposal be found to violate the agency's right to determine its budget under section 7106(a) of the Statute.").

The language and legislative history of the Statute supports our conclusion that a broad balancing of factors is appropriate in evaluating compelling need assertions such as the Agency makes here. In enacting the Statute, Congress found that collective bargaining in the Federal sector is in the public interest because, among other things, it facilitates and improves employees' performance and the efficient accomplishment of the operations of the Government. See section 7101(a) of the Statute. Moreover, with respect to compelling need, it is clear from the legislative history of the Statute that Congress intended a regulation to bar negotiations only on narrow grounds. In this regard, Congressman Ford, addressing this section of the Statute, stated:

> The compromise position in section 7117 was accepted with the understanding that the . . . compelling need test will be permitted to be raised in only a limited number of cases.*/

Our conclusion is also consistent with a recent holding of the U.S. Court of Appeals for the District of Columbia Circuit, affirming a decision by the General Counsel in the context of an unfair labor practice case that an informal settlement agreement effectuated the purposes of the Statute. The Court stated:

> [E]conomic hardship is a fact of life in employment, for the public sector as well as the private. Such monetary considerations often necessitate substantial changes. If an employer was released from its duty to bargain whenever it had suffered economic hardship, the employer's duty to bargain would practically be non-existent in a large proportion of cases.

American Federation of Government Employees v. FLRA, 785 F.2d 333 at 338 (D.C. Cir. 1986).

To the extent that our decisions in Dugway Proving Ground, 18 FLRA No. 38 (1985), and National Association of Government Employees, Local R14-9 and U.S. Army Dugway Proving Ground, Dugway, Utah, 18 FLRA No. 45 (1985), are inconsistent with our decision here, they will no longer be followed. In this case, the Agency has failed to establish any facts concerning financial and other pertinent factors sufficient to provide a basis for finding a compelling need for its regulations under section 2424.11(a) of the Authority's Rules. Therefore, the Agency has failed to establish that the Arbitrator's award is contrary to section 7122(a) of the Statute as alleged.

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*/ 124 Cong. Rec. 29199 (1978) (statement of Rep. Ford), reprinted in Sub-comm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 956 (Comm. print No. 96-7).

V. DECISION

Accordingly, for the above reasons, the Agency's exception is denied.

Issued, Washington, D.C. November 17, 1986

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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Federal Labor Relations Authority

Washington, D.C. 20424

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NUMBER 404 REPORT OF CASE DECISIONS November 19, 1986

UNFAIR LABOR PRACTICE CASES

24 FLRA No. 8 (November 19, 1986)

Veterans Administration and Veterans Administration Medical Center, Lyons, New Jersey and American Federation of Government Employees, AFL-CIO, Local 1012, Case No. 2-CA-40271

24 FLRA No. 12 (November 19, 1986)

Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, New York Region, Case Nos. 2-CA-40051 and 2-CA-40102

24 FLRA No. 13 (November 19, 1986)

Social Security Administration, Northeastern Program Service Center and American Federation of Government Employees, Local 1760, AFL-CIO, Case No. 2-CA-30643

NEGOTIABILITY CASES

24 FLRA No. 7 (November 18, 1986)

National Association of Government Employees, Local R4-75 and U.S. Department of the Interior, National Park Service, Blue Ridge Parkway, Case No. O-NG-1144

24 FLRA No. 10 (November 19, 1986)

American Federation of State, County and Municipal Employees, Local 2478 and U.S. Commission on Civil Rights, Case No. O-NG-1068

Y3.F31/21-3:

ARBITRATION CASES

24 FLRA No. 9 (November 19, 1986)

National Federation of Federal Employees, Local 1374 and Pacific Missile Test Center (Miller, Arbitrator), Case No. 0-AR-1185

24 FLRA No. 11 (November 19, 1986)

Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO (Smith, Arbitrator) Case No. 0-AR-1262

Federal Labor Relations Authority

24 FLRA No. 7

NAGE, Local R4-75 and Dep't of the Interior, National Park Service, Blue Ridge Parkway, Case No. 0-NG-1144 (Decided November 18, 1986)

SUBJECT MATTER INDEX ENTRIES

- ASSIGN EMPLOYEE
  - MISSION ESSENTIAL EMPLOYEES
    - ROTATION OF ASSIGNMENTS
- ASSIGN WORK, RESERVED MANAGEMENT RIGHT
  - HEALTH AND SAFETY
  - LEAVE
- CODE OF FEDERAL REGULATIONS
  - 5 C.F.R. 752.404
  - 5 C.F.R. 752.203(c)
  - 5 C.F.R. 404(b)(3)(i)(v)
- COLLECTIVE BARGAINING AGREEMENT
  - RATIFICATION/APPROVAL OF AGREEMENT
    - AGENCY HEAD'S REVIEW OF CONTRACT PROVISIONS [7114(c)]
- DISCIPLINE OF EMPLOYEES
  - SUSPENSION
    - ADVANCE NOTIFICATION OF
- EMERGENCY ACTION, RESERVED MANAGEMENT RIGHT [7106(a)(2)(D)]
  - LEAVE
- HEALTH AND SAFETY
  - PHYSICAL EXERTION BEYOND SAFE LIMITS
    - ASSISTANCE TO EMPLOYEES
- LEAVE
  - ANNUAL LEAVE OR VACATION PAY
    - ASSIGNMENT OF
      - EMERGENCIES
      - SENIORITY BASIS
- NEGOTIABILITY PROCEDURE
  - ALLEGATION OF NONNEGOTIABILITY
    - AGENCY HEAD'S DISAPPROVAL OF AN AGREEMENT [7114(c)]
- PROCEDURES, MANDATORY SUBJECTS OF BARGAINING [7106(b)(2)]
  - BALANCING OF AGENCY RIGHTS AND EMPLOYEE RIGHTS
  - SUSPENSION, RESERVED MANAGEMENT RIGHT
- SUSPEND EMPLOYEES, RESERVED MANAGEMENT RIGHT [7106(a)(2)(A)]
  - FOURTEEN (14) DAYS OR LESS
    - ADVANCE NOTIFICATION OF
  - IMPACT ON MANAGEMENT'S RIGHT TO ASSIGN WORK

STATUTE

- 7105(a)(2)(E)
- 7106(a)(2)(A), (B), (C) and (D)
- 7106(b)(1), (2) and (3)
- 7114(c)

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UNITED STATES CODE
5 U.S.C. 7513(b)(1)
5 U.S.C. 7501 - 7504
5 U.S.C. 7103(b)(2)
5 U.S.C. 7512
5 U.S.C. 7513
5 U.S.C. 7514

DIGEST NOTES

A provision is negotiable that creates a procedure for resolving conflicts between employee annual leave schedules based on seniority. The provision does not violate management's right under section 7106(a)(2)(B) to assign work because the provision preserves management's right to schedule and approve leave based on its work requirements. (provision 1)

A provision is negotiable that advises employees that they may be called back from leave in emergencies. The provision does not limit the agency's right to act in emergencies under section 7106(a)(2)(D) by imposing a definition of "emergency" on management. (provision 2)

A provision is negotiable that requires the agency to provide employees at least 15 days advanced written notice prior to suspending the employee for 14 days or less. The provision applies to suspension of employees under 5 U.S.C. sections 7501-7504 and 5 C.F.R. section 752.101-.203, which require agencies to follow certain procedures when they propose to suspend employees for 14 days or less. Under no circumstances would the provision preclude the agency from initiating disciplinary action against an employee. Rather, the provisions is a negotiable procedure under section 7106(b)(2). The provision balances the agency's need to impose discipline against employees' rights to have notice of and an opportunity to answer the charges against them. Other language in the parties' agreement, which refers to 5 U.S.C. section 7513 and 5 C.F.R. section 752.404, preserves the agency's right to separate an employee from the workplace, without delay, for a serious offense and where the employee's presence at the workplace might threaten other agency employees, agency property, or other legitimate agency interests. The provision does not interfere with the agency's right to assign work under 7106(a)(2)(B) as alleged by the agency. The provision does not affect the agency's determination concerning the assignment of work to an employee during the periods prior to an employee's suspension and does not require that suspensions become effective at any particular time. (provision 3)

A provision is negotiable that requires management to provide assistance to employees -- in the form of other personnel or additional tools or equipment -- when the physical exertion required for a task exceeds safe limits under applicable directives. The provision does not violate management's right to assign work under section 7106(a)(2)(B) because it does not prevent management from assigning work to employees or empower employees to refuse work assignments. (provision 4)

Although not raised by the agency, implementation of certain provisions could affect management's rights to determine numbers, types, and grades of employees who are assigned to a work project or the methods and means of performing work. These matters are permissive subjects of bargaining under section 7106(b)(1), that is matters on which the agency may elect to bargain or not to bargain. Bargaining on the provisions occurred at the local level and an agreement was executed. The agency head disapproved the provision pursuant to section 7114(c). However, permissive subjects of bargaining negotiated and agreed upon locally, may not be disapproved by an agency head under section 7114(c) simply because they relate to section 7116(b)(1) matters. [provision 4]

A provision is negotiable that requires the assignments of personnel who are mission essential be rotated in situations where less than a full workforce is required, to ensure that these assignments are evenly distributed. The provision does not affect management's discretion to determine which agency personnel are mission essential and it does not interfere with management's right to assign employees under section 7106(a)(2)(A). [provision 5]

Federal Labor Relations Authority

24 FLRA No. 8

VA and VA Medical Center, Lyons, N.J. and AFGE, Local 1012, Case No. 2-CA-40271
(Decided November 19, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
AGENCY ULP (ALLEGED) 7116(a)(1)	7116(a)(1), (2) and (5)
STATEMENTS BY AGENCY OFFICIALS	7118
AGENCY ULP (ALLEGED) 7116(a)(2)	
PROMOTION	
AGENCY ULP (ALLEGED) 7116(a)(5)	
POSITION, FILLING OF	
SUPERVISORY POSITIONS	
FILLING OF SUPERVISORY POSITIONS NOT . . . A CONDITION OF EMPLOYMENT	
PROCEDURES, MANDATORY SUBJECTS OF BARGAINING [7106(b)(2)]	
PREVIOUSLY BARGAINED MATTERS THAT ARE NOT CONDITIONS OF EMP.	
NO OBLIGATION TO BARGAIN OVER PROCEDURES FOR CHANGES	
PROMOTION	
PROTECTED ACTIVITY	
FAILURE TO PROMOTE NOT BASED ON ANTI-UNION ANIMUS	
STATEMENTS BY SUPERVISORS OR MANAGEMENT OFFICIALS	
PERSONAL OPINION WITHOUT THREATS OR PROMISE OF BENEFITS	

DIGEST NOTES

The agency did not violate section 7116(a)(1) and (2) when it failed to select for promotion the union vice president to be the Acting Associate Chief of Nursing Services for Education, a temporary position. Although he was apparently qualified for the position, the Judge found that the record was insufficient to establish that his union activity was the basis for his non selection.

The agency did not violate section 7116(a)(1) and (5) by unilaterally changing its methods of filling the Acting Associate Chief of Nursing Services for Education (ACNSE), a temporary supervisory position. Since the ACNSE position was a supervisory position, the filling of the position on a rotational basis did not involve a condition of employment, and changing the procedure did not change a condition of employment. While an agency can elect to negotiate over matters that are not conditions of employment such as the procedure for filling a supervisory position, as the agency did in this case, negotiation does not convert the procedure into a condition of employment. Accordingly, the agency's unilateral change in the procedure did not involve a condition of employment, and there was no obligation to bargain over the decision to make that change. Likewise, the agency did not have an obligation to bargain over the impact and implementation of the change.

Statements by an acting supervisor to the union vice president that he could be fired for his union activity if he were in the private sector did not, under the circumstances, violate section 7116(a)(1). The statement was not in any way a threat and could not be reasonably taken as one. The acting supervisor was a longtime union member and chief steward who was a fellow instructor of the union vice president for more than five years and talked to him on a daily basis. Whether or not the acting supervisor's interpretation of law in the private sector was correct, her statement was merely her personal opinion of what the situation was. Moreover, the statement, rather than being interpreted as a treat, could have just been interpreted as meaning that the employee could not be discharged for his union activity in the Federal Government.

Federal Labor Relations Authority

24 FLRA No. 9

NFFE, Local 1374 and Pacific Missile Test Center (Miller, Arbitrator), Case No. 0-AR-1185 (Decided November 19, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
ARBITRABILITY	7106(a)(2)(B)
CONTRACTING OUT ISSUES	7122(a)

ARBITRATION AWARDS, REVIEW OF, EXCEPTIONS ASSERTED IN APPEAL
  AWARD CONTRARY TO THE FSLMR STATUTE
    SECTION NOT SPECIFIED
ARBITRATION AWARDS, MODIFIED OR SET ASIDE BY AUTHORITY
  AWARD CONTRARY TO THE FSLMR STATUTE [7122(a)(1)]
    7106(a)(2)(B)
OMB CIRCULARS
  A-76

DIGEST NOTES

Contrary to the arbitrator, the Authority held that a grievance claiming that a procurement action failed to comply with OMB Circular A-76 and management's right under section 7106(a)(2)(B) to make determinations with respect to contracting out is within the broad scope grievance and arbitration procedure prescribed by the Statute.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

24 FLRA No. 10

AFSCME, Local 2478 and U.S. Commission on Civil Rights, Case No. 0-NG-1068 (Decided November 19, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
ARBITRATION	7106(a)(2)(E)
AUTHORITY OF ARBITRATOR	7106(a)(2)(A)
APPOINTMENT OF THE ARBITRATOR	7121(b)(3)(C)
CONTRACTUAL PROVISION PROVIDING FOR APPOINTMENTS BY FMCS	
FEDERAL MEDIATION AND CONCILIATION SERVICE (FMCS)	
APPOINTMENT OF ARBITRATORS BY FMCS	
CODE OF FEDERAL REGULATIONS	
29 C.F.R. 1404.13(c)	
DISCIPLINE EMPLOYEES, RESERVED MANAGEMENT RIGHT [7106(a)(2)(A)]	
CONTRACTUAL "STATUTE OF LIMITATIONS"	

DIGEST NOTES

A proposal is nonnegotiable that would establish a contractual "statute of limitations" which precludes the agency from taking disciplinary action against an employee for incidents that occurred more than a year prior to the agency's action. The proposal is inconsistent with management's right under section 7106(a)(2)(A) to discipline employees. [proposal 1]

A proposal is negotiable that provides for appointment of arbitrators by the Federal Mediation and Conciliation Service (FMCS) to hear a case if the agency refuses to participate in the selection of an arbitrator. FMCS regulations [29 C.F.R. section 1404.13(c)] state that FMCS will make a direct appointment of an arbitrator when authorized by an applicable collective bargaining agreement. (proposal 2)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal
Labor Relations
Authority

24 FLRA No. 11

HHS, SSA and AFGE (Smith, Arbitrator), Case No. 0-AR-1262 (Decided November 19, 1986

SUBJECT MATTER INDEX ENTRIES	STATUTE
ARBITRATION PROCEDURE	7122(a) and (b)

ARBITRATION PROCEDURE
  EX PARTE HEARING
    VOLUNTARY NONPARTICIPATION IN A HEARING
  FINALITY OF AWARD
    BENCH RULINGS
  TIMELINESS
    APPEAL OF BENCH RULINGS IN A BIFURCATED ARBITRATION PROCESS

DIGEST NOTES

An arbitrator's bench rulings in a bifurcated arbitration process are final when rendered and ripe for filing exceptions with the Authority at that time. While an agency may elect not to participate in the hearing at which the bench awards are made, it acts at its own peril. The computation of the time limit for filing exceptions to an arbitrator's bench ruling begins when it is rendered. The fact, as in this case, that one party to the process chooses not to participate at the hearing, and consequently does not receive a copy of the arbitrator's bench ruling at the same time as another party who was at the hearing, does not alter the time limits in which to file exceptions with the Authority.

Federal Labor Relations Authority

24 FLRA No. 12

HHS, SSA and SSA Field Operations, New York Region and AFGE, Case Nos. 2-CA-40051 and 2-CA-40102 (Decided November 19, 1986)

SUBJECT MATTER INDEX ENTRIES

- AGENCY ULP (ALLEGED) 7116(a)(5)
  - SETTLEMENT AGREEMENT
- COLLECTIVE BARGAINING
  - GROUND RULES
    - MID TERM BARGAINING
- PERFORMANCE APPRAISAL SYSTEM
  - AUDITING OR MEASURING WORK PERFORMANCE
    - CONTINUOUS AUDIT
    - CHANGE IN AUDITING PROCEDURES
  - EMPLOYEE PARTICIPATION
- PROCEDURE
  - FORUMS
    - COLLECTIVE BARGAINING AGREEMENT INTERPRETATION
      - PROCEDURES ADOPTED BY THE PARTIES IN THEIR AGREEMENT
- SETTLEMENT AGREEMENTS
  - REPUDIATION OF SETTLEMENT AGREEMENT
    - NOT BREACHED
  - SET ASIDE BY REGIONAL DIRECTOR

STATUTE

7116(a)(1) and (5)
7118

DIGEST NOTES

The agency's insistence on receiving substantive proposals regarding the impact and implementation of a change in its auditing procedures for performance evaluations did not violate sections 7116(a)(1) and (5). The agency sought to replace its semiannual audit of employee performance with continuous audits. Under the semiannual audit procedures, employees were given advance notice of the audits and an opportunity to review their pending cases and correct any errors or shortcomings. Under the continuous audit procedure, employees are not given advance notice of the audit nor an opportunity to examine their caseload and correct errors.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

The parties' dispute was one of long standing that involved differing and arguable interpretations of the parties over the requirements of their national agreement governing mid-term bargaining procedures. The FLRA Regional Director had issued a settlement agreement which he later withdrew. The agency interpreted the controlling national agreement as requiring that the union submit substantive proposals on the impact and implementation of the new audit procedures. The union, on the other hand, sought to first negotiate on ground rules governing the mid-term negotiations prior to submitting substantive proposals. The Authority held that the appropriate forum for resolution of such disputes over contract interpretation is through the grievance and arbitration procedures of the parties' agreement rather than through unfair labor practice procedures.

Federal Labor Relations Authority

24 FLRA No. 13

SSA, Northeastern Program Service Center and AFGE, Local 1760, Case No. 2-CA-30643
(Decided November 19, 1986)

SUBJECT MATTER INDEX ENTRIES

- AGENCY ULP (ALLEGED) 7116(a)(5)
  - INFORMATION
- AGENCY ULP (ALLEGED) 7116(a)(8)
  - 7114(b)(4)
- INFORMATION, EMPLOYEE AND UNION RIGHTS UNDER THE STATUTE
  - ALTERNATE MEANS OF ACCOMPLISHING THE OBJECTIVE
    - MERE EXISTENCE INSUFFICIENT FOR DENIAL (NAMES & ADDRESSES)
  - NECESSITY OR RELEVANCE FOR FULL AND PROPER DISCUSSION
    - ALTERNATIVES TO REQUESTED INFORMATION
      - MERE EXISTENCE OF OTHER MEANS NOT SUFFICIENT FOR DENIAL
  - PRIVACY
    - BALANCING TESTS: INDIVIDUAL'S PRIVACY RIGHTS VS.:
      - UNION'S RIGHT TO INFORMATION
  - REASONABLY AVAILABLE [7114(b)(4)(B)]
    - NAMES AND HOME ADDRESSES OF BARGAINING UNIT EMPLOYEES
  - FREEDOM OF INFORMATION ACT [5 U.S.C. 552]
    - PRIVACY ACT [5 U.S.C. 552a]
      - EXCEPTION: INFORMATION REQUIRED TO BE RELEASED BY FOIA
- UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
  - INFORMATION TO BE PROVIDED UNION

STATUTE

- 7114(b)(4)
- 7116(a)(1), (5) and (8)
- 7118

DIGEST NOTES

The release of the names and home addresses of bargaining unit employees to the exclusive representative of those employees is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets the other requirements of section 7114(b)(4). Applying the balancing test under exemption (b)(6) of the Freedom of Information Act to the Privacy Act rights of employees, it has been determined that the privacy act interest of the average employee to the release of their names and addresses is not very compelling. Alternate means of communication with bargaining unit employees that are available to the union are inadequate. The home addresses of bargaining unit employees were reasonably available to the activity in this case and would not place an undue burden on the activity to provide the union with the requested information. Accordingly, the Authority held, in a decision remanded from the U.S. Court of Appeals for the Second Circuit, that the activity violated section 7116(a)(1), (5) and (8) when it refuse to provide the home addresses to the exclusive representative for employees that it represented.

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24 FLRA No. 7

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R4-75

Union

and

Case No. 0-NG-1144

U.S. DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
BLUE RIDGE PARKWAY

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of five provisions of a negotiated agreement disapproved by the Agency head under section 7114(c) of the Statute.[1]

II. Provision 1

> Article XIV, Annual Leave, Section 4
>
> In the event of a conflict in annual leave scheduling among employees, the senior employee based on length of service, using service computation dates, will be given first choice in the absence of determinable hardship and thereafter rotated in descending seniority sequence. However, length of

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[1] In response to the Union's petition for review, the Agency withdrew its disapprovals of two provisions: "Article XIV, Annual Leave, Section 1" and "Article XXVIII, Training, Section 3." Accordingly, these provisions need not be considered here.

> service shall not be used for the same choice leave each year, (e.g., Christmas Holidays, July 4th Holidays, New Year Holidays, first week of hunting season and etc.).

A. Positions of the Parties

The Agency asserts that the provision violates its right to assign work under section 7106(a)(2)(B) of the Statute because the provision mandates leave approvals, based on seniority, which may conflict with work requirements. The Union disputes this assertion.

B. Analysis and Conclusion

The provision is negotiable. As worded and explained by the Union, the provision creates a procedure for resolving conflicts between employee leave schedules. Where the number of employees who apply for leave for a particular period exceeds the number management can release from work during that period, the provision requires that the more senior employees will be given preference. The Agency's interpretation of the provision -- that it requires that employee leave requests take precedence over management's work requirements -- is unsupported. The provision creates a procedure for resolving conflicts among employee requests for leave.

Although the Agency correctly cites Authority precedent on management's right to disapprove leave requests which conflict with its work requirements, for example, American Federation of Government Employees, AFL-CIO, Local 2263 and Department of the Air Force, Headquarters, 1606th Air Base Wing (MAC), Kirtland Air Force Base, New Mexico, 15 FLRA 580, 583-84 (1984), that precedent is inapplicable to this provision because the provision preserves management's right to schedule and approve leave based on its work requirements.

III. Provision 2

> Article XIV, Annual Leave, Section 8
>
> An employee may be called back from leave when an emergency arises.

A. Positions of the Parties

The Agency claims the provision conflicts with management's right to assign work under section 7106(a)(2)(B) of the Statute because it would prevent management from calling employees back from leave except in emergencies. The Union asserts that the Agency has misinterpreted the provision.

B. Analysis and Conclusion

The provision is negotiable. As worded and explained by the Union, the provision advises employees that they may be called back from leave in emergencies. The provision does not limit management's right to cancel leave to a particular definition of an "emergency" or limit management's right to cancel leave for other reasons. Further, unlike provision 2 in National Federation of Federal Employees, Local 2059 and U.S. Department of Justice, U.S. Attorney's Office, Southern District of New York, New York, New York, 22 FLRA No. 13 (1986), this provision does not limit the Agency's right to act in emergencies under section 7106(a)(2)(D) of the Statute by imposing a definition of "emergency" on management.

IV. Provision 3

> Article XXVI, Disciplinary and Adverse Actions, Section 6(b)
>
> (b) An employee against whom an adverse action is proposed is entitled to a total of at least thirty (30) calendar days advance written notice prior to the effective date of the action taken. An employee shall be given at least fifteen (15) calendar days advance notice prior to the effective date of a suspension of fourteen (14) days or less. These time frames shall not preclude the EMPLOYER from taking immediate action if the crime provisions are invoked in accordance with 5 U.S.C. 7513(b)(1) and 5 C.F.R. 752.404(d). [Only the underscored sentence is in dispute.]

A. Positions of the Parties

The Agency argues that the disputed language conflicts with management's right to discipline employees under section 7106(a)(2)(A) of the Statute because the provision would prevent it from suspending employees on 24-hour notice. The Agency also argues that the disputed language conflicts with management's right to assign work under section 7106(a)(2)(B) of the Statute because suspending an employee from work inherently concerns whether work will be assigned to that employee. The Union argues that the provision is negotiable because it constitutes a "procedure" or an "appropriate arrangement" under section 7106(b)(2) and (3) of the Statute and it does not conflict with management's right to discipline employees.

B. Analysis and Conclusion

The disputed language is within the Agency's duty to bargain under section 7106(b)(2) of the Statute. As worded and explained by the Union, the disputed language applies to suspensions of employees under 5 U.S.C. §§ 7501-7504 and 5 CFR § 752.101-.203, which require agencies to follow certain procedures when they propose to suspend employees for 14 days or less. For these suspensions, under 5 U.S.C. § 7503(b)(2) employees are to be provided with a "reasonable time" to answer the proposed action. Under 5 CFR § 752.203(c), employees must be given at least 24 hours to answer.

The Agency has not argued or shown that an answer period of 15 days, as provided in the disputed language, is contrary to 5 U.S.C. § 7503(b)(2) or 5 CFR § 752.203(c). Accordingly, we find that the disputed language is consistent with applicable law and regulations. The disputed language also does not conflict with management's right to take disciplinary action. Under no circumstances would the provision preclude the Agency from initiating disciplinary action against an employee. Rather, it establishes a procedure to be followed after disciplinary action has been proposed. Compare National Federation of Federal Employees, Local 615 and National Park Service, Sequoia and Kings Canyon National Parks, U.S. Department of the Interior, 17 FLRA 318 (1985), aff'd sub nom. NFFE Local 615 v. FLRA, No. 85-1299 (D.C. Cir. Sept. 12, 1986). The provision balances the Agency's need to impose discipline against employees' rights to have notice of and an opportunity to answer the charges against them and does not prevent the Agency from exercising its rights. The provision, therefore, constitutes a negotiable procedure under section 7106(b)(2).

As noted by the Union, other language in the agreement provision, which refers to 5 U.S.C. § 7513 and 5 CFR § 752.404, preserves the Agency's right to separate an employee from the workplace, without delay, for a serious offense and where the employee's presence at the workplace might threaten other Agency employees, Agency property, or other legitimate Agency interests. The Office of Personnel Management's (OPM's) implementing regulations at 5 CFR § 752.404(b)(3)(i)(v) detail a list of options for this purpose. In addition, the fact that the provision requires the Agency to follow the procedures of 5 U.S.C. §§ 7512-7514 and 5 CFR § 752.401-.406 when contemplating such immediate actions does not render the provision nonnegotiable. The Authority has consistently held that provisions requiring management to exercise its statutory rights under section 7106 in compliance with law are within the duty to bargain. American Federation of Government Employees, AFL-CIO, International Council of U.S. Marshals Service Locals and Department of Justice, U.S. Marshals Service, 11 FLRA 672, 677-78 (1983).

Finally, the provision does not affect the Agency's right to assign work. The provision does not affect the Agency's determinations concerning the assignment of work to an employee during the period prior to an employee's suspension and does not require that suspensions become effective at any particular time. The Agency is therefore free to determine employees' work assignments during the period a suspension is in prospect, and when it becomes effective.

V. Provision 4

Article XXX,
Health and Safety, Section 6

> The EMPLOYER will provide relief or assistance to an employee who is required to lift an item, or operate machinery or equipment, requiring physical exertion beyond safe limits specified in current applicable directives.

A. Positions of the Parties

The Agency asserts that the provision conflicts with management's right to assign work because it would allow an employee to refuse work. The Union disputes this and argues that the provision is negotiable as an "appropriate arrangement" under section 7106)b)(3) of the Statute.

B. Analysis and Conclusion

The provision is negotiable. The provision requires management to provide assistance to employees--in the form of other personnel or additional tools or equipment--when the physical exertion required for a task exceeds safe limits under applicable directives. As worded and explained by the Union, the provision does not prevent management from assigning work to employees or empower employees to refuse work assignments. Accordingly, the provision does not conflict with management's right to assign work under section 7106(a)(2)(B) of the Statute.

The assistance required by the provision would take the form of additional personnel, tools or equipment. Union Response to Agency Statement of Position at 6. Although not raised by the Agency, implementation of the provision could affect management's rights to determine numbers, types, and grades of employees who are assigned to a work project or the methods and means of performing work under section 7106(b)(1) of the Statute. *See*, *for example*, *International Organization of Masters, Mates and Pilots and Panama Canal Commission*, 13 FLRA 508, 524 (1983); *Laborers' International Union, Local No. 1276 and Department of Defense, Defense Logistics Agency*, 12 FLRA 62 (1983). These matters are permissive subjects of bargaining under section 7106(b)(1), that is, matters on which the Agency may elect to bargain or not to bargain. *See*, *for example*, *American Federation of Government Employees, AFL-CIO, National Immigration & Naturalization Service Council and U.S. Department of Justice, Immigration & Naturalization Service*, 8 FLRA 347, 381-82 (1982), *enforcement denied as to other matters sub nom. Department of Justice v. FLRA*, 709 F.2d 724 (D.C. Cir. 1983); *Department of Justice v. FLRA*, 727 F.2d 481, 487-88 (5th Cir. 1984). Negotiations on permissive subjects may begin and later cease. *See Civil Service Reform Act of 1978: Conference Report*, H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. 154 (1978), *reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, H.R. Comm. Print No. 96-7, 96th Cong., 1st Sess. 793, 822 (1979) (where it is stated: "In sum, the conference report fully preserves the right of management to refuse to bargain on "methods and means" and to terminate bargaining at any point even if it initially agrees to negotiations.")

In this case, bargaining on the provision occurred at the local level and an agreement was executed. Disapproval of the provision occurred pursuant to section 7114(c) of the Statute. Local agreements are subject to review by the agency head (or designee) under section 7114(c). *National Treasury Employees Union, Chapter 52 and Internal Revenue Service, Austin District*, 23 FLRA No. 93 (1986). As for the scope of the review, however, "[s]ection 7114(c) strictly limits the occasions in which the head of the agency may invalidate an agreement[.]" *AFGE v. FLRA*, 778 F.2d 850, 859 n.15 (D.C. Cir. 1985). Section 7114(c) requires approval by the agency head "if the agreement is in accordance with the [Statute] and any other applicable law, rule, or regulation[.]"

We conclude that agreement provisions may not be disapproved by an agency head under section 7114(c) simply because they relate to section 7106(b)(1) matters. These provisions are not inconsistent with the Statute. They differ, in this respect, from provisions which conflict with management's rights under section 7106(a) of the Statute. Unlike section 7106(a), which provides that "nothing in [the Statute] shall affect the authority of any management official" to exercise those rights, section 7106(b)(1) provides that "nothing in this section shall preclude an agency" from electing to bargain on those subjects. Provisions relating to section 7106(b)(1) matters, therefore, may be included in an agreement in accordance with the Statute. As a result, unless they are otherwise inconsistent with applicable law, rule, or regulation, these provisions are not subject to disapproval under section 7114(c).[2]

VI. Provision 5

> Article XXI,
> Adverse Weather Policy, Section 5
>
> Within those functions where there are two or more employees performing the same function and less than the full work force is required a reasonable effort will be made to rotate the personnel designated as mission essential. The names of the personnel designated as mission essential will be posted in the work area and updated to reflect changes.

A. Positions of the Parties

The Agency asserts that the provision conflicts with section 7106(a)(2)(A) because it would prevent management from assigning employees to tasks based on their individual abilities. The Agency also asserts that the provision prevents the Agency from determining which Agency personnel are mission essential and that it is nonnegotiable for this reason because these determinations are critical for the Agency's internal security practices. The Union disputes these assertions.

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[2] For a similar conclusion under the analogous agency head review provisions of Executive Order 11491, as amended, see AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland, 3 FLRC 397, 400-01 (1975).

B. Analysis and Conclusion

The provision is negotiable. As explained by the Union, this provision merely requires that assignments of personnel who are mission essential be rotated in situations where less than a full workforce is required, to ensure that these assignments are evenly distributed. The provision does not affect management's discretion to determine which Agency personnel are mission essential. The provision also explicitly preserves management's right to change these determinations as it deems necessary.

The provision is analogous to the proposals on overtime assignments held negotiable by the Authority in *National Federation of Federal Employees, Local 1622 and U.S. Commissary, Fort Meade, Maryland*, 16 FLRA 998, 999-1000 (1984) and *American Federation of Government Employees, AFL-CIO, National Joint Council of Food Inspection Locals and Department of Agriculture, Food Safety and Quality Service, Washington, D.C.*, 9 FLRA 663, 664-65 (1982). The Authority found that those proposals did not violate management's right to assign work under section 7106(a)(2)(B) because they only established procedures for assigning work to employees who normally perform such work.

VII. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency rescind its disapproval of the disputed provisions.[3]

Issued, Washington, D.C. November 18, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[3] In finding the disputed provisions to be negotiable, the Authority makes no judgment as to their merits.

24 FLRA No. 8

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION AND
VETERANS ADMINISTRATION MEDICAL
CENTER, LYONS, NEW JERSEY

Respondent

and

Case No. 2-CA-40271

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1012

Charging Party

DECISION AND ORDER

I. Statement of the Case

This case is before the Authority on limited exceptions filed by the General Counsel to the attached Administrative Law Judge's Decision. The Judge found that the Veterans Administration and Veterans Administration Medical Center, Lyons, New Jersey (Respondent) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by its failure to bargain with the American Federation of Government Employees, AFL-CIO, Local 1012 (Charging Party) as to the adverse effects on bargaining unit employees of its change in the system of rotating instructors into the the Acting Associate Chief of Nursing Service for Education (ACNSE) position. He further found that Respondent had not engaged in other alleged unfair labor practices. The issues presented by the limited exceptions to the Judge's decision concern an allegedly coercive supervisor's statement, the unilateral change in the method of filling the Acting ACNSE (supervisory) position and the violation found pertaining to failure to bargain about that change. In partial disagreement with the Judge, we find no merit to any of the allegations contained in the complaint.

II. Facts

The facts are fully set out in detail by the Judge and are repeated herein only to the extent that they concern matters related to the General Counsel's exceptions. The Charging Party is the bargaining agent for the professional registered nurses employed by the Respondent.

A. Procedures for Filling the Acting ACNSE Position

On March 18, 1983, the Charging Party's Vice President sent the Chief Nurse a memorandum requesting negotiations concerning the detailing of all nursing education instructors to staff nursing positions. Contemporaneous with this proposed change, the current ACNSE requested a transfer to another position at another hospital. On April 1, 1983, representatives of the Charging Party and Respondent's management officials met and negotiated concerning the detailing of instructors to staff nursing positions. This meeting, in part, was devoted to a discussion of the procedure to be used in temporarily filling the ACNSE vacancy.

The parties did not sign a written agreement concerning this matter. The Charging Party prepared and sent an "agreement" to the Respondent which contained the Charging Party's understanding of what the parties had agreed to at their meeting. The Respondent refused to sign the proposed "agreement." The Respondent prepared minutes of the meeting, however, and sent them to the Charging Party. Paragraph 2 of the minutes provided that details would be for the shortest time possible, with each detail being reviewed every four weeks. Paragraph 2 also provided that based on need, details could be discontinued, changed or extended. Paragraph 4 of the minutes provided in pertinent part that "instructors will rotate through the Acting ACNSE position for one month," and is substantially the same as paragraph 5 of the Charging Party's "agreement." Subsequently, the Respondent began rotating instructors though the Acting ACNSE position. On November 23, 1983, Respondent, without notice to the Charging Party, altered the procedure and detailed an employee indefinitely to fill the Acting ACNSE position. The Respondent asserted that this change was made because the rotation system was not effective.

B. Allegedly Coercive Statement

On February 8th and 9th of 1984, Bernard Canete, a nursing instructor at the Respondent and Vice President of the Charging Party was involved in processing an unfair labor practice charge. The parties had decided to settle the charge and Canete and Ms. Benson, a steward of the

Charging Party, were responsible for drawing up a settlement agreement. On the evening of February 9th, Acting ACNSE Dorothy Brenner asked Benson how long she would be involved in the Union work so that she could fill out the time logs. Canete, whose office was next to Benson's, heard Benson say, "Dorothy, you are harassing me." Canete told Brenner that management had given him and Benson time and that Brenner was harassing them. Brenner went into Canete's office and told him, "Mr. Canete, if you had been at St. Claire's Hospital you can be fired with your union activities."

III. Judge's Decision

The Judge concluded that the Respondent did not violate section 7116(a)(1) of the Statute by the supervisor's statement to an employee because under the circumstances, the statement was not coercive or imtimidating. The Judge also found that the Respondent did not violate section 7116(a)(1) and (5) of the Statute by uni-unilaterally changing its method of filling the Acting ACNSE position. The latter finding was based on National Labor Relations Board Union, Local 21 and National Labor Relations Board, 15 FLRA 798 (1984), where the Authority stated that "a proposal concerning the filling of supervisory positions, including temporary appointments is negotiable only at the election of the agency since it does not concern a condition of employment of bargaining unit employees. . . ." The Judge found that since the Acting ACNSE position was a supervisory position, the filling of the position on an acting basis did not involve a condition of employment and changing the procedure did not change a condition of employment. Further, the Judge found that whether Respondent breached its contractual term or not by unilaterally changing the method of filling the Acting ACNSE position, as the filling did not involve a condition of employment, the Respondent did not violate the Statute.

Notwithstanding the above, the Judge found that the Respondent violated section 7116(a)(1) and (5) of the Statute by failing to bargain with the Charging Party about the adverse effects on bargaining unit employees of its decision to change the procedure for filling the Acting ACNSE position. The Judge stated that where an agency makes a decision that has a reasonably direct adverse impact on bargaining unit employees and their conditions of employment, the agency is required by the Statute to notify and bargain with the union concerning the adverse effects of such change upon employees. The Judge noted that because of the change, the instructors no longer had an equal opportunity to experience and learn the skills useful for promotion and that those instructors not given the opportunity had to perform certain of the tasks and duties of those who were given the opportunity.

Further, the Judge found that the Respondent did not violate section 7116(a)(1) and (2) of the Statute by the failure of its Key Committee to recommend Canete for selection to the ACNSE position. In so finding, the Judge concluded that the evidence was insufficient to justify an inference that the Key Committee's decision was based on Canete's Union activity and was insufficient to justify discrediting the testimony of the Key Committee Members that Canete's Union activity was not considered in the Committee's determination. No exceptions were filed to the Judge's conclusion in this regard.

IV. Positions of the Parties

The General Counsel argues that the Judge erred in finding that the Respondent did not violate section 7116(a)(1) and (5) of the Statute when it unilaterally changed the method of filling the position of Acting ACNSE, a supervisory position. Although the General Counsel agrees with the Judge that the procedures which an Activity uses to fill a supervisory position are bargainable only at the election of the agency, it asserts that the Respondent elected to negotiate about the procedures and entered into an agreement with the Charging Party on how the Acting ACNSE position was to be filled. The General Counsel argues that the Respondent could not thereafter repudiate the agreement without violating section 7116(a)(1) and (5) of the Statute. The General Counsel contends that the Respondent by making a permanent assignment of an employee to the Acting ACNSE position repudiated its agreement to rotate the position among unit employees and thereby violated section 7116(a)(1) and (5) of the Statute by unilaterally changing working conditions of unit employees.

Further, the General Counsel argues that the Judge erred in finding that Acting ACNSE Brenner's statement to Canete did not violate section 7116(a)(1) of the Statute. It is the General Counsel's view that a statement to a union representative that the employee's union activity could result in the employee being fired at a private hospital constitutes a threat that the protected activity can lead to the same consequences at a public hospital. Consequently, the General Counsel concluded that the statement exceeded the expression of opinion and constituted interference, restraint and coercion in violation of section 7116(a)(1) of the Statute.

V. Analysis

In agreement with the Judge and based on his rationale, we adopt his finding that the Respondent did not violate section 7116(a)(1) and (2) by failing to recommend Canete for selection to the ACNSE position. In adopting the Judge's finding, we note that the General Counsel filed no exceptions to the finding.

A. Procedures for Filling the Acting ACNSE Position

We agree with the Judge, based on his rationale, that the Respondent did not violate section 7116(a)(1) and (5) of the Statute by changing the method for filling the Acting ACNSE position. The Acting ACNSE position was a supervisory position. The filling of the position on a rotational basis did not involve a condition of employment, and changing the procedure did not change a condition of employment. While an agency can elect to negotiate about the procedure for filling a supervisory position, as the Respondent did in this case, negotiation does not convert the procedure into a condition of employment. Accordingly, the Respondent's unilateral change in the procedure did not involve a condition of employment, and there was no obligation to bargain over that change.

We reject the General Counsel's argument that the Respondent repudiated its agreement with the Charging Party concerning the procedure for filling the Acting ACNSE position. The parties prepared documents setting forth separate versions of the meeting. The Union prepared an "agreement," which the Respondent refused to sign, and the Respondent prepared minutes of the meeting. The Judge found that none of the parties objected to the minutes as written and that all stated that the minutes reflected what was agreed upon. The Respondent maintains, not inconsistent with the minutes of the meeting, that the understanding reached by the parties was that management would fill the position by rotation on a trial basis but that management retained the authority to change or terminate the procedure at any time management determined that rotation was not working effectively. The Union disagrees. In these circumstances, assuming that the minutes reflect an agreement, we find that this aspect of the case involves differing and arguable interpretations of the parties' agreement. In cases involving disputed interpretations of an agreement, the aggrieved party's remedy is through the grievance and arbitration procedures available to the parties, or other appropriate proceedings, rather than through unfair labor practice procedures. See Department of Health and Human Services, Social Security Administration, 23 FLRA No. 62 (1986).*/

Moreover, even assuming that the Respondent's subsequent rotation of employees through the position was sufficient to establish a past practice, the Respondent was under no obligation to bargain over the change or termination of the practice since the subject matter did not involve a condition of employment. Nuclear Regulatory Commission, 17 FLRA 972 (1985).

Furthermore, we disagree with the Judge's finding that the Respondent violated the Statute when it failed to bargain with the Charging Party about the adverse effects of the change. Since changing the method for filling the Acting ACNSE position did not change a condition of employment, the Respondent was under no obligation to bargain over the impact and implementation of the change. See Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island, 11 FLRA 316 (1983); and Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Groton, Connecticut, 4 FLRA 578 (1980). Thus, we will dismiss the section 7116(a)(1) and (5) violation found by the Judge.

B. The Allegedly Coercive Statement

We agree with the Judge, based on his rationale, that the Respondent did not violate section 7116(a)(1) of the Statute by the statement of its supervisor, Acting ACNSE Brenner, to Canete. In agreement with the Judge, we conclude that Brenner's statement to Canete would not, under the circumstances, tend to coerce or intimidate him as the statement was merely Brenner's opinion of what the situation was in the private sector and could not reasonably be construed or interpreted as a threat.

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*/ In view of the above, we find it unnecessary to pass upon the Judge's statement pertaining to the enforcement of a contractual obligation.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, we have reviewed the findings of the Judge made at the hearing and find that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision, the positions of the parties and the entire record, we adopt the Judge's findings, conclusions and recommended Order as modified.

We conclude that the Respondent did not violate section 7116(a)(1) and (2) of the Statute by the failure of its selection committee to recommend that a bargaining unit employee be considered for selection for the supervisory position of ACNSE; did not violate section 7116(a)(1) of the Statute by a statement made by one of its supervisors to a bargaining unit employee; and did not violate section 7116(a)(1) and (5) of the Statute by changing the method of filling the Acting ACNSE position. We conclude further, contrary to the Judge, that the Respondent did not violate section 7116(a)(1) and (5) of the Statute by failing to bargain with the Charging Party about the adverse effects on employees of the decision to change the method of filling the Acting ACNSE position. Accordingly, we dismiss the complaint in its entirety.

ORDER

IT IS ORDERED that the complaint in Case No. 2-CA-40271 be, and it hereby is, dismissed.

Issued, Washington, D.C., November 19, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

VETERANS ADMINISTRATION AND
VETERANS ADMINISTRATION MEDICAL
CENTER, LYONS, NEW JERSEY

Respondent

and

Case No. 2-CA-40271

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1012

Charging Party

. . . .

Leslie Vincent, Esq.
For the Respondent

Lee Whitaker
For the Charging Party

Lee Mingledorff, Esq.
For the General Counsel, FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq., 92 Stat. 1191 (hereinafter referred to as the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410 et seq.

A charge was filed on March 22, 1984 and amended April 17, 1984 by the American Federation of Government Employees, AFL-CIO, Local 1012, (hereinafter referred to as AFGE Local 1012 or the Union), against the Veterans Administration (VA) and Veterans Administration Medical Center, Lyons, New Jersey (VAMC Lyons) hereinafter referred to jointly as Respondent. Pursuant to the above described charge and amended charge, on August 31, 1984, the General Counsel of the FLRA, by the Regional Director for Region II issued a Complaint and Notice of Hearing alleging that Respondent violated Sections 7116(a)(1), (2) and (5) of the Statute. Respondent filed an Answer denying that it had violated the Statute.

A hearing was conducted before the undersigned in New York, New York. Respondent, Charging Party and General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Post hearing briefs were filed and have been fully considered.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material herein AFGE has been the exclusive representative for a nationwide unit of nurse professional employees of the VA, which includes nurse professional employees at VAMC Lyons. AFGE Local 1012 is the local agent of AFGE at VAMC Lyons and is recognized as such by Respondent.

The Discrimination Allegation

Bernard T. Canete has, at all times material, been employed at VAMC Lyons as a nursing instructor. He has held this position since 1978. He is also Vice-President of the professional RN unit and he has held this position since February 1983. Prior to holding this position he was the chief steward in the professional unit. He held this position from 1981 to 1983. As Vice President, Canete's duties involve dealing with management on grievances, arbitrations and other types of employee complaints. He is also a member of AFGE Local 1012 executive committee and is the Union's representative on the VAMC Lyons EEOC committee and on the Hispanic Employment Program at VAMC Lyons. Canete, as Vice President, represents employees under the negotiated grievance procedure, in the later stages, in meetings with higher management officials including the Chief of Nursing, Chief of Personnel, Chief of Staff, and Medical Center Director. He represented the Union in negotiations with management at VAMC Lyons on proposed shift change for nurses. During these negotiations, which lasted from April 1983 to October 1983, he dealt with Wanda Daniels who was Chief of Nursing. In addition to these negotiations Canete was involved as chief negotiator in negotiations on the detailing of instructors. These negotiations also lasted from March 1983 to the following October. Canete was involved in the first unfair labor practice charge filed by the Union on December 27, 1983 and that prior to the filing of the charge he had met with VAMC Lyons management on the matter during the middle of October 1983. During the second meeting with managment during these negotiations, the Personnel Officer told Canete to forget about employee needs and concerns and to speak about his promotion to Associate Chief of Nursing Service for Education (ACNSE). When Canete declined to set aside his union business for a discussion of his promotion he was told the reference was meant to be a joke.

Canete was considered for the position of ACNSE in October of 1983. This came about as a result of the settlement of an EEO complaint which Canete filed in July of 1981. Canete was told by the VA's attorney that the only way to resolve the EEO case was to give Canete top priority consideration for the ACNSE.

The Nursing Service Key Committee located at VA's Central Office in Washington, D.C. considered candidates for the ACNSE and failed to recommend Canete for the position.

Donna Humes, a Deputy Director of Respondent works for Assistant Chief Medical Director Ferguson and served as Chairman of the Key Committee. There were seven members of the Key Committee. When the Key Committee has a vacancy to consider, it is VA policy to speak with the hospital director or the chief of staff to ask them what qualifications they are looking for in a candidate. There are also other opportunities for the Key Committee members to communicate with these officials. In considering Canete for the position the Key Committee reviewed Canete's personnel folder and his Board Action Folder. Maragret de Weaver is the member of the Committee that communicated to the Committee the fact that Canete had had an opportunity to act in the ACNSE position and that there was concern by local VAMC Lyons management about his indecisiveness.[1] De Weaver had reviewed Canete's record and had explored his qualifications with Daniels, the VAMC Lyons Chief of Nursing. De Weaver in fact presented a summary of Canete's qualifications which was apparently relied upon by the other members of the Key Committee. De Weaver was the only Key Committee member who had knowledge that Canete was a Union member or held an office within AFGE and did not discuss this with the Key Committee. The Key Committee reviews approximately 25 files a week. There were references throughout Canete's personnel file concerning his having filed discrimination complaints; there was also a letter of appreciation by VAMC Lyons to Canete for his role as the Acting ACNSE from January 1981 to June 1981 and a favorable evaluation. The reason the Committee did not consider Canete's successful performance in the role of Acting ACNSE in 1981 to be determinative was that the Committee had information through de Weaver, from Daniels, that Canete was indecisive and did not properly handle his administrative responsibilities in a proper fashion. Finally, significant consideration was given in Canete's evaluation dated June 6, 1983 which indicated that Canete had a weakness in terms of his interpersonal relationships. Canete's personnel file, when his application was considered, included Canete's 1980-81, 1981-82, and 1982-83[2] annual proficiency reports. In addition to his proficiency reports Canete's personnel folder contained a statement of his accomplishments as ACNSE from January to June of 1981. In addition to the above documents, Canete's personnel file at the time it was reviewed by the Key Committee contained the following documents: several letters of appreciation; Canete's Curriculum Vitae, a document which summarizes his experience and education background; an AFGE certificate stating that Canete attended training as a union steward; and an AFGE certificate stating Canete received Officers and Stewards Training.

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[1] De Weaver was the member of the Committee assigned to work with the nursing services in the mid-Atlantic area and as such she had the most knowledge concerning Canete's qualifications and the situation at VAMC Lyons.

Canete was notified of his rejection by the Key Committee on November 2, 1983 by a letter he received from A. Paul Morris, the Acting Regional Director for Respondent's Mid-Atlantic Region. This letter, prepared by de Weaver, states that the reason Canete was not referred for selection was because his recent work experience in education had been limited to the VAMC Lyons, except for the period of time, 1970-71, when he was an assistant clinical instructor in a hospital school of nursing. Subsequent to his being rejected by the Key Committee, Canete asked for an explanation of why he was rejected, but he received no explanation. In this connection it should be noted that subsequent to the filing of the charge herein, Respondent set forth in two letters its response to the charge. In one letter, dated April 20, 1984, Respondent gave as the explanation for the rejection of Canete his lack of experience, knowledge, skills, and abilities and other characteristics per the guidance contained in Respondent's Program Guide for Nursing Service, G-15, M-2, Part V, Appendix B. In its June 27, 1984 letter Respondent asserted that although mobility could have been a factor considered, the primary considerations were his qualifications and experience and the consensus was that Canete would be better suited to a smaller, less active station than VAMC Lyons.

The qualifications for the ACNSE position are set forth in an August 1, 1980 Position Requirement Memorandum from Daniels, the 1982 Position Description for ACNSE position approved by Daniels, Respondent's pamphlet of facts on the position, and Respondent's Program Guide for Nursing

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[2] It should be noted that the reference in his 1982-83 proficiency report to his having been involved in activities which extended beyond his nursing education function, is apparently a reference to a counseling memo concerning Canete's unexcused absences from work due to his activities as a union steward. The counseling memo was not in Canete's personnel folder at the time he was considered by the Key Committee.

Service. Essentially they set forth the qualifications as being a Master Degree (a higher degree is preferred) with a major in nursing from a National League of Nursing accredited program; four years of nursing experience of which one year should be in teaching; some experience in basic nursing administration; and mobility or a willingness to accept transfer to meet the needs of the Nursing Service. The Program Guide, which was referenced in Respondent's April 20, 1984 position letter, lists courses and other contributory preparation relative to qualifying for the ACNSE position. Examples of contributory experiences are the planning and implementation of learning experiences for patients, families, and nursing staff; participation on Nursing Service and hospital committees; serving on the Nurse Professional Standards Board; participating in developing the Nursing Service philosophy and goals; participation in writing the educational component of the annual report for Nursing Service; participating in developing intra VA and extra VA details; developing and completing a thesis or research project; teaching experience in courses for registered nurses, practical nurses and nursing assistants; and participation in activities at Regional Medical Educations Centers.

In an affidavit related to the EEO complaint admitted into evidence, Wanda Daniels, the Chief Nurse at VAMC Lyons, was asked how she would evaluate Canete's qualifications for the ACNSE position at VAMC Lyons. She responded that he was very well qualified and that he could manage the position. Vernice Ferguson, the Deputy Assistant Chief Medical Director for Nursing Programs at Respondent's Central Office in Washington, D.C., also gave an affidavit in the EEO proceeding and stated that lack of mobility would not be a single determinant justifying nonselection since management needed to be sensitive to the fact that people have been promoted in place and that there was compassionate reasons to honor a candidates lack of mobility. Daniels' and Ferguson's statements were made in December of 1982 and January 1983, respectively.

A number of the members of the Key Committee testified[3] at the hearing herein and stated that they did not know of Canete's Union activities, that such activities were not discussed and were not considered in deciding whether to recommend Canete for the ACNSE position. In all the circumstances I credit the members of the Key Committee that Canete's Union activities was not a consideration in their determination not to recommend him for the ACNSE position at VAMC Lyons.[4]

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[3] De Weaver did not testify.

[4] Thus, although when appropriate, surrounding circumstances might be sufficient to discredit such witnesses and to infer that Canete was refused the recommendation because of his Union activities, I conclude these Key Committee members were very credible witnesses and the surrounding circumstances not sufficient to justify discrediting them.

Further I conclude that ACNSE is a supervisory and/or managerial position. All parties assumed this and the Program Guide sets forth supervisory duties, including "Directs, counsels, and evaluates performance of nursing instructors . . ."

The Alleged Statement by Brenner

Allan Stadtmauer an FLRA agent had set up appointments with Canete to investigate an unfair labor practice charge on February 8th and 9th of 1984. On the 8th of February an entire day was taken up speaking to the agent; around 4:00 p.m. Stadtmauer suggested that the parties explore the possibilities of an informal settlement. Canete had spent the entire duty day working in the unfair labor practice charge. Canete's immediate supervisor on February 7, 8 and 9, 1984 was Dorothy Brenner, Acting ACNSE. At 7:15 p.m. on February 9th Canete and Benson, a steward, were still working on the settlement agreement. Canete went into his office. Brenner, as Acting ACNSE asked Benson[5] how long she would be involved in the Union work. Brenner asked so she could fill out time logs. After a while Canete heard Benson say in a loud tone of voice, "Dorothy, you are harassing me." Canete on hearing this (he was next door to Benson's office) told Brenner in a tone of voice loud enough for her to hear, that management had given him and Benson time and that Brenner was harassing them. Brenner then left her office and came into Canete's office and told him, "Mr. Canete, if you had been at St. Claire's Hospital[6] you can be fired with your union activities." Canete said he was shocked by what was said and that he had a settlement agreement in his hand. Brenner then turned around and returned to her office. Brenner had had to teach Canete's classes on the 8th and 9th of February and she had previously related to him that she did not like the idea of having to take these courses because Canete was engaging in Union activities.

Brenner and Canete had worked together for several years as instructors. Also Brenner was a member of the Union and Chief Steward. Subsequently she resigned from the Union.

The Alleged Unilateral Change in Working Conditions

On March 18, 1983 Canete sent Daniels a memo requesting negotiations concerning the detailing of all nursing education instructors to staff nursing positions. Contemporaneous with this proposed change the current ACNSE requested a transfer to another position at another hospital. In order to fill the position being vacated management detailed a unit employee, Nursing Instructor Long, to be, effective March 25, 1983, Acting

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[5] Brenner and Benson shared an office.

[6] A private hospital.

ACNSE for an indefinite period. The Union objected to the Long assignment. On April 1, 1983 representatives of the Union and VAMC Lyons management officials met and negotiated concerning the detailing of instructors to staff nursing positions. Part of this meeting was devoted to a discussion of the procedure to be used in temporarily filling the ACNSE vacancy. On April 1, 1983, subsequent to the meeting, the Union sent an agreement to the Medical Center Director which contained that to which the Union thought the parties had agreed. Management refused to sign the agreement.

Subsequent to the union's written version of the agreement being prepared, VAMC Lyons management prepared its own document purporting to be the minutes that the parties had agreed to. This document was received by the Union on April 1st, the same day as its version of the agreement was submitted. Management's minutes, regarding paragraph 4,[7] is the substantially same as paragraph 5[8] of the Union's version of the agreement. None of the parties objected to the minutes as written and all stated the minutes reflected what was agreed upon. Subsequent to the agreement of the parties on April 1st, management began rotating instructors though the Acting ACNSE position. On November 23, 1983 management unilaterally altered the procedure it was following and detailed Brenner indefinitely to fill the Acting ACNSE position. This change was made because management felt the rotation system had faults and was not very effective. The Union subsequently met with management, soon afterwards, to protest the decision to stop the rotating details but met with no success. Management subsequently wrote a memo on December 27, 1983 explaining that the decision to terminate the rotation of nursing education personnel was made by the Chief of Staff but that it had the support of the Medical Center Director. The Union protested management's position by letter on January 5, 1984.

The impact on employees of management's decision to end the rotation of nurses through the Acting ACNSE position were severalfold. First the indefinite detail of Brenner into the position on November 27, 1983 changed the level of supervision which prepared employee proficiency reports. During the rotation period this was done by the Chief Nurse, a second level supervisor; after the rotation ended, the rating official became once more the Acting ACNSE, the immediate supervisor. Another impact of the indefinite detail of Brenner was that during the period of the detail the employees and Union lost the benefit of the services of Brenner, the Union's chief steward, who had been, up to that point, very active. Also employees who had been given an opportunity on a rotating basis to be Acting ACNSE now lost that opportunity and with it the chance to acquire experience which would be helpful in promotions.

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[7] Paragraph 4 of the minutes provides: "Except for Ms. Sagl and Mrs. Washington, Instructors will rotate through the Acting ACNSE position for one month."

[8] Paragraph 5 of the Union version provides: "Acting ACNSE will be rotated through instructors for one month each (except Ms. Sagl and Ms. Washington)."

Discussion and Conclusions of Law

General Counsel of the FLRA alleges that the Key Committee failed to recommend Canete for selection for the ACNSE position because Canete had engaged in protected activity on behalf of AFGE Local 1012 and that by so doing VA violated Section 7116(a)(1) and (2) of the Statute. The FLRA has held that, in order to establish this type violation of Section 7116(a)(1) and (2) of the Statute, the General Counsel of the FLRA has the burden of establishing that the alleged discriminatee had engaged in protected activity, that Respondent had knowledge of such activity and that Respondent took the alleged discriminatory action because of its union animus. Cf. Internal Revenue Service, 6 FLRA 96 (1981); United States Forces/Eighth United States Army, 11 FLRA 434 (1983) and Department of Transportation, Federal Aviation Administration, Boston Air Route Traffic Control Center, Nashua, New Hampshire, 11 FLRA 318 (1983).

In the subject case it is well established that Canete was an official of AFGE Local 1012 and was very active on its behalf. He processed grievances, and negotiated contract terms on behalf of AFGE Local 1012. As a representative of AFGE Local 1012, Canete had dealings with many officials of VAMC Lyons. Thus Canete's activities on behalf of Local 1012 were apparently well known at VAMC Lyons. Further, because de Weaver was that member of the Key Committee who communicated directly with the officials of VAMC Lyons, it reasonable to infer that de Weaver was aware of Canete's activities on behalf of AFGE Local 1012.

Thus, although a member of the Key Committee might have known about Canete's union activity, I conclude that the Key Committee did not base its determination to refuse to recommend Canete for the ACNSE position upon Canete's union activity. I have credited the testimony of the members of Key Committee that Canete's Union activity was not discussed or mentioned during his consideration and that a number of the members of the Key Committee did not know of Canete's Union activity. Further the record fails to establish union animus on the part of the Key Committee or the VA management. Thus, although Canete seemed a qualified candidate for a ACNSE position, I conclude the surrounding circumstances, as established in the record, are insufficient to justify an inference that the Key Committee's decision was based on Canete's Union activity and are insufficient to justify discrediting the testimony of the Key Committee members that Canete's Union activity was not a consideration in the Committee determination.

Accordingly, I conclude that Respondent did not violate Section 7116 (a)(1) and (2) of the Statute when its Key Committee did not recommend Canete for the ACNSE position.

With respect to Brenner's statement the FLRA has held that a supervisor's statement violates Section 7116(a)(1) of the Statute when it reasonably tends to coerce or intimidate employees in the exercise of protected rights and that an objective test is applied. Federal Mediation and Conciliation Service, 9 FLRA 199 (1982). In the subject case I conclude that Brenner's statement to Cante would not have tended to coerce or intimidate a reasonable employee. Thus although Brenner was an acting supervisor, she was also a longtime Union member and chief steward. Further she was a fellow instructor who shared an office with Benson and had been a fellow employee with Canete for five (5) years and she and Canete talked together on a daily basis. Most important however, was Brenner's statement was not in any way a threat and could not reasonably be taken as one. Brenner stated that if Canete had been at St. Claire hospital, a private hospital, he could be fired for his union activity. This could not be reasonably construed or interpreted as a threat. It was clear to all that Canete did not work for St. Claire Hospital and that therefore he was safe from being fired. I need not decide whether Brenner's interpretation of the law in the private sector, is correct, it was merely a statement by her of her opinion of what the situation was in the private sector. It could not be interpreted as a threat, directly or indirectly, that somehow an employee of the VA was subject to discharge for union activity. In fact the exact opposite inference, that a VA employee could not be discharged for union activity, might reasonably be drawn. Federal Mediation and Conciliation Service, supra.

The FLRA has stated, "It is well established that a proposal concerning the filling of supervisory positions, including temporary appointments, is negotiable only at the election of the agency since it does not concern a condition of employment of bargaining unit employees . . ." National Labor Relations Board and National Labor Relations Board Union, Local 21, 15 FLRA 798 (1984) (hereinafter called the NLRB case). Therefore, I am constrained to conclude that filling of the ACNSE position, on a temporary basis, "does not concern a condition of employment of bargaining unit employees," NLRB case, supra at 798, and that although Respondent was not obliged to bargain concern filling the ACNSE position, it could voluntarily do so. In the instant case, whether it breached its contractual term or not, Respondent did unilaterally change the method in which filled the Acting ACNSE position by changing from a one month rotation basis to a permanent acting basis. However, because the filling the ACNSE position, on acting basis, does not involve a condition of employment, changing such a matter does not involve changing a term of employment. Accordingly, I must, conclude that Respondent did not unilaterally change a condition of employment, when it changed its method for filling the acting ACNSE position. Thus although the FLRA held management can elect to negotiate about such a noncondition of employment, such negotiation does not and cannot convert a noncondition of employment to a condition of employment.[9] Presumably all negotiating does is, perhaps, provide the union with some action to enforce the contractual obligations, e.g., through grievance procedures, etc.

I must conclude therefore that Respondent did not violate Section 7116(a)(1) and (5) of the Statute when it changed its method of filling the Acting ACNSE position. See NLRB Case, supra; Nuclear Regulatory Commission, 17 FLRA No. 132 (1985) and United States Department of Treasury, U.S. Customs Service, 18 FLRA No. 1 (1985).

General Counsel of the FLRA urges, further that Respondent violated Section 7116(a)(1) and (5) of the Statute because it changed the method of assignment of the employees into the Acting ACNSE position without first affording the Union an opportunity to bargain over the impact and implementation of the change. Because, as discussed above, the filling of the Acting ACNSE position did not involve a condition of employment, no obligation to bargain over the impact and implementation of the change as created by Section 7106 of the Statute. However, where an agency makes a purely managerial decision that has a reasonably direct adverse impact on employees and upon their conditions of employment, the agency is required by the Statute, to notify and bargain with the union concerning the adverse effects of such change upon employees. This would be in keeping with the statutory scheme of granting federal employees meaningful collective bargaining. It is a recognition that although management has the right to make purely managerial decisions free from any obligation to bargain with union concerning such decisions, where such decisions would have a direct adverse impact on employees, management does have an obligation to bargain with the union representing the employees to minimize the adverse affect of the decisions upon the employees. Cf. NLRB v. Gray-Grimes Tool Co., 96 LRRM 2212 (3rd Cir. 1977); NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965).

In the subject case the decision to change the system of rotating instructors into the Acting ACNSE position had a direct and substantial adverse effect on unit employees. Instructors no longer had an equal opportunity to have the experience and to learn the skills useful for promotion and those instructors not given the acting supervisory position had to perform certain of the tasks and duties of those who were given the opportunity to act as a supervisor.

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[9] In reaching its conclusion in the NLRB Case, supra, I note that the FLRA based its finding on the conclusion that the filling of a supervisory position is not a "condition of employment", it did not base its finding on Section 7106 of the Statute, which basically exempts certain conditions of employment from bargaining because of management rights considerations. Section 7106 provides, however, an obligation to bargain about the impact and implementation of changes in such "management rights" conditions of employment. Thus the FLRA's conclusion in the NLRB Case, supra, that management could voluntarily negotiate about the filing of supervisory positions, was not pursuant to Section 7106 because it did not involve one of the "management rights" conditions of employment.

Accordingly I conclude that Respondent's failure to bargain with the Union about the adverse effect upon employees of its decision to change the method of appointing Acting ACNSE position violated Section 7116(a)(5) and (1) of the Statute.

Having concluded that Respondent did not violate the Statute with respect to the Key Committee's failure to recommend Canete for the ACNSE position, the statement by Brenner to Canete, and the failure to bargain about the change in the method of appointing employees to the Acting ACNSE position; but that Respondent did violate Section 7116(a)(5) and (1) of the Statute by failing to bargain with the Union about the adverse effect upon employees of its decision to change the method of filing the Acting ACNSE position, I recommend that the Authority issue the following:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute, the Authority hereby Orders the Veterans Administration and Veterans Administration Medical Center, Lyons, New Jersey, shall:

1. Cease and desist from:

   (a) Refusing to bargain with American Federation of Government Employees, AFL-CIO, concerning the adverse effect of changes in the method of appointing an acting Associate Chief of Nursing Service for Education or any other change that has a direct and adverse effect upon employees.

   (b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

   (a) Upon request bargain in good faith with American Federation of Government Employees, AFL-CIO, concerning the adverse effect of the changes in the method of appointing an acting Associate Chief of Nursing Service for Education or any other change that has a direct and adverse effect upon employees.

(b) Post at Veterans Administration Medical Center, Lyons, New Jersey, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a responsible official and shall be posted by him for 60 consecutive days in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The official shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(c) Pursuant to 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, 26 Federal Plaza, Room 2237, New York, New York 10278, in writing within 30 days from the date of this Order as to what steps have been taken to comply herewith.

Samuel A Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: August 21, 1985
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain with American Federation of Government Employees, AFL-CIO, concerning the adverse effect of changes in the method of appointing an acting Associate Chief of Nursing Service for Education or any other change that has a direct and adverse effect upon employees.

WE WILL NOT in any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL upon request bargain in good faith with American Federation of Government Employees, AFL-CIO, concerning the adverse effect of the changes in the method of appointing an acting Associate Chief of Nursing Service for Education or any other change that has a direct and adverse effect upon employees.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region II, whose address is: 26 Federal Plaza, Room 2237, New York, New York 10278 and whose telephone number is: (212) 264-4934.

24 FLRA No. 9

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1374
Union

and

PACIFIC MISSILE TEST CENTER
Activity

Case No. 0-AR-1185

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Anthony Miller filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

A grievance was filed claiming that the decision to contract out certain fuel service functions failed to comply with applicable procurement law and regulations including OMB Circular A-76. The grievance was submitted to arbitration where the threshold issue was whether the grievance was grievable and arbitrable. The Arbitrator as his award ruled that the grievance was not arbitrable. In reaching this determination, he rejected the decisions of the Authority and the U.S. Court of Appeals for the District of Columbia Circuit in American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission, 10 FLRA 3 (1982) (proposal 1), enforced sub nom. EEOC v. FLRA, 744 F.2d 842 (D.C. Cir. 1984), cert. dismissed, 106 S. Ct. 1678 (1986) (per curiam). Instead, he agreed with the decision of the court in Defense Language Institute, Presidio of Monterey, California v. FLRA, 767 F.2d 1398 (9th Cir. 1985), denying enforcement of National Federation of Federal Employees, Local 1263 and Defense Language Institute, Presidio of Monterey, California, 14 FLRA 761 (1984). Specifically, he held that the grievance was foreclosed by management's right under section 7106(a)(2)(B) of the Statute to make determinations with respect to contracting out and by the provisions of OMB Circular A-76.

III. EXCEPTION

In its exception the Union essentially contends that by finding the grievance not to be arbitrable, the award is contrary to the Statute.

IV. ANALYSIS AND CONCLUSIONS

We agree with the Union. In a series of recent decisions, we again addressed the issue of whether a grievance claiming that a procurement action failed to comply with applicable procurement law and regulation, including OMB Circular A-76, was grievable and arbitrable under the Statute. Citing EEOC, 10 FLRA 3, among other cases, we held that a grievance claiming that a procurement action failed to comply with applicable procurement law and regulation is within the broad scope grievance procedure prescribed by the Statute and is not precluded by law or regulation, including management's right under section 7106(a)(2)(B) to make determinations with respect to contracting out. United States Army Communications Command, Fort McClellan and Local No. 1941, American Federation of Government Employees, AFL-CIO, 23 FLRA No. 23 (1986); General Services Administration and America Federation of Government Employees, AFL-CIO, Council 236, 22 FLRA No. 84 (1986); Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, AFL-CIO, Local 2840, 22 FLRA No. 72 (1986). Furthermore, we specifically adhered to this view while noting that this approach had been rejected by the court in Defense Language Institute. See Headquarters, 97th Combat Support Group (SAC), slip op. at 2 n.2.; American Federation of Government Employees, AFL-CIO, Local 1923 and Department of Health and Human Services, Office of the Secretary, Office of the General Counsel, Baltimore, Maryland, 22 FLRA No. 106 (1986), slip op. at 4 n.2. Consequently, because the Arbitrator based his award on his view of the grievance procedure prescribed by the Statute rather than a specific exclusion from the grievance procedure negotiated by the parties, we find that his award ruling that the grievance was not arbitrable is deficient as contrary to the Statute and must be modified accordingly.

V. DECISION

The Arbitrator's ruling that the grievance in this case is not arbitrable under the grievance procedure prescribed by the Statute is struck. Accordingly, this ruling is removed as a bar to further resolution of the grievance. This resolution must be in accordance with the Statute and decisions of the Authority pertaining to grievances disputing determinations by agencies to contract out agency work.

Issued, Washington, D.C., November 19, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazer III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(24 FLRA No. 10)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 2478

Union

and

Case No. O-NG-1068

U.S. COMMISSION ON CIVIL
RIGHTS

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of two Union proposals. We hold Union Proposal 1 to be nonnegotiable and Union Proposal 2 to be negotiable.

II. Union Proposal 1

> Article 29, Section 3. (Disciplinary Actions)
>
> When it is determined by the Employer that disciplinary action is necessary, the employee will be promptly informed of the reasons why the action is being taken. Such action will be accomplished with dispatch and normally be initiated within 30 days after management becomes aware of the alleged occurrence. In no case will the Employer bring disciplinary action against an employee for occurrences which are alleged to have happened more than one year previously. [Only the underscored portion is in dispute.]

A. Positions of the Parties

The Agency contends that this proposal is outside the duty to bargain because it interferes with management's right to discipline employees, under section 7106(a)(2)(A) of the Statute. The Union contends that the proposal would merely protect employees' rights by insuring prompt disciplinary action and would not violate the Agency's right to discipline its employees. It also contends that by negotiating over the proposal the Agency would not endanger its ability to proceed with disciplinary actions when such actions are required by law, as the parties' agreement contains provisions to that effect.

B. Analysis

The proposal would prohibit the Agency from taking any disciplinary action against employees for occurrences alleged to have happened more than one year previously. In our opinion, this proposal is to the same effect as a provision found nonnegotiable in National Federation of Federal Employees, Local 615 and National Park Service, Sequoia and Kings Canyon National Parks, U.S. Department of Interior, 17 FLRA 318 (1985) (Provision 2), affirmed sub nom. National Federation of Federal Employees, Local 615 v. FLRA, No. 85-1299 (D.C. Cir. Sept. 12, 1986), which required that investigations of incidents for which disciplinary action may be taken normally be initiated within 60 days of the incident or within 60 days after the employer becomes aware of the incident. The Authority noted that by establishing a contractual "statute of limitations" which would preclude it from investigating incidents which may result in the disciplining of employees, the provision would, in certain circumstances, prevent the agency from acting at all with respect to that right. See also American Federation of Government Employees, AFL-CIO, Local 1770 and Department of the Army, Headquarters, XVII Airborne Corps and Fort Bragg, North Carolina, 17 FLRA 752 (1985) (Union Proposal 3). The proposal in this case, likewise, would establish a contractual limitation which would, in certain circumstances, prevent the Agency from acting at all with respect to its right to discipline employees.

As a result of this analysis, the Authority finds it unnecessary to address the Union's additional contention.

C. Conclusion

For the reasons given here and in the cases cited in the analysis, Union Proposal 1 is inconsistent with management's right to discipline employees under section 7106(a)(2)(A) of the Statute and is, therefore, outside the duty to bargain.

III. Union Proposal 2

> Article 32, Section 4. (Arbitration)
>
> If for any reason the Employer refuses to participate in the selection of an arbitrator, the Federal Mediation and Conciliation Service shall be empowered to make a direct designation of an arbitrator to hear the case.

A. Positions of the Parties

The Agency did not include in its statement of position any contentions in support of its allegation that this proposal is nonnegotiable. The Union contends that the proposal merely requires the Agency to participate in the arbitration process, as required by section 7121(b)(3)(C) of the Statute.[1]

B. Analysis and Conclusion

This proposal seeks to empower the Federal Mediation and Conciliation Service (FMCS), an entity not a party to the collective bargaining agreement, to directly designate an arbitrator to hear a case if the Agency refuses to participate in the selection of an arbitrator. As indicated above, the Agency provides no support for its allegation that the proposal is nonnegotiable, nor does it appear to be so. We note that 29 C.F.R. § 1404.13(c),[2] issued by the FMCS pursuant to Title II of the Labor-Management Relations Act of 1947 (Pub. L. 80-101) as amended in 1959 (Pub. L. 86-257) and 1974 (Pub L. 93-360), is applicable to "all persons or parties seeking to obtain from FMCS either names or panels of names of arbitrators in connection with disputes which are submitted to arbitration or fact-finding." That provision expressly states that the FMCS will make a direct appointment of an arbitrator when authorized by an applicable collective bargaining agreement. Thus, the proposal appears to be fully consistent with FMCS's regulations. Since the Agency has made no showing, nor is it otherwise apparent, that this proposal is nonnegotiable, we conclude that Union Proposal 2 is within the duty to bargain.

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[1] Section 7121(b)(3)(C) of the Statute requires that any negotiated grievance procedure must include procedures that "provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency[.]"

[2] 29 C.F.R. 1404.13(c) provides, in pertinent part, as follows:

(Continued)

IV. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposal 2.[3] The petition for review as it relates to Union Proposal 1 is dismissed.

Issued, Washington, D.C. November 19, 1986.

Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(Continued)

> (c) The Service will, on joint or unilateral request of the parties, submit a panel or, when the applicable collective bargaining agreement authorizes, will make a direct appointment of an arbitrator[.]

3/ In finding this proposal within the duty to bargain, the Authority makes no judgment as to its merits.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, SOCIAL SECURITY
ADMINISTRATION

Agency

and

Case No. 0-AR-1262

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the bench rulings of Arbitrator Justin Smith filed by the Agency pursuant to section 7122(a) of the Federal Service Labor Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reason stated below, it has been determined that the exceptions must be dismissed as untimely filed.

This case involves a dispute submitted to the Arbitrator concerning official time for representational activities. By agreement of the parties, a two-phase arbitration process was established to resolve the basic dispute and the resulting numerous individual grievances. The first phase involved the interpretation of the official time provisions of the Statute and the parties' collective bargaining agreement. In the second phase, the Arbitrator held hearings to resolve, by bench decisions when practicable, specific grievances pending in various regions of the Agency. The exceptions in this case have been filed to bench decisions of the Arbitrator rendered at ex parte hearings held on September 11 and 12, 1986 at which the Agency declined to participate. The official trancript of the hearings was apparently served on the parties by mail on or about October 14, 1986.

Under section 7122(b) of the Statute, as amended,[1] and section 2425.1 of the Authority's Rules and Regulations, as amended,[2] which amendments are applicable to exceptions pending or filed with the Authority on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to computation of the time limit here involved, any exceptions to the Arbitrator's rulings in this case had to be filed, that is, received in the national office of the Authority not later than the close of business on October 10 and 14, 1986, respectively. However, the Agency's exceptions were not filed with the Authority until October 30, 1986.

The Agency asserts essentially that because the instant arbitration hearings were conducted ex parte, no representative of the Agency was present at the hearing to be served with notice of the Arbitrator's bench decisions in question. The Agency contends, therefore, that since its exceptions were filed within thirty days after it was served with the official transcript of the hearing, which is the date that it received notice of the Arbitrator's bench decisions, the exceptions were timely filed.

It is well settled, particularly in cases involving other related bench rulings between these same parties, that the Arbitrator's bench rulings are final when rendered and ripe for filing exceptions with the Authority at that time. See American Federation of Government Employees and Social Security Administration, 21 FLRA No. 14 (1986); U.S. Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO, 22 FLRA No. 16 (1986); U.S. Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO, 23 FLRA No. 19 (1986).

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[1] Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an Arbitrator's award begins on the date the award is served on the filing party.

[2] 49 Fed. Reg. 22623 (1984).

Turning to the due process considerations raised by the Agency, such argument can not be sustained. The record clearly indicates that the Agency voluntarily chose not to participate at the hearings at which the Arbitrator's bench decisions were rendered. Thus, by choosing not to do so, the Agency acted at its own peril and, in these circumstances, the fact that the Agency was not served with the Arbitrator's bench decisions when they were rendered at ex parte hearings did not toll the time period for filing exceptions. Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO, 24 FLRA No. 2 (1986). Accordingly, the Agency's exceptions filed on October 30, 1986, more than thirty days after the Arbitrator's bench decisions were rendered, were untimely filed and, therefore, they must be dismissed.

For the Authority.

Issued, Washington, D.C., November 19, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

24 FLRA No. 12

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION AND
SOCIAL SECURITY ADMINISTRATION
FIELD OPERATIONS, NEW YORK REGION

Respondent

and

Case Nos. 2-CA-40051
2-CA-40102

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Judge's Decision and a supporting brief.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's decision, the exceptions to that Decision, and the entire record, the Authority hereby adopts the Judge's findings,[1] conclusions,[2] and recommended Order that the complaint be dismissed. In doing so, we note that the parties' dispute is one of long standing that involves differing and arguable interpretations by the parties over the requirements of their national agreement, which the Authority has recently found to be appropriate for resolution through the grievance and arbitration procedures of that agreement but not through unfair labor practice procedures. *Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, New York Region*, 23 FLRA No. 62 (1986).

ORDER

The complaint in Case Nos. 2-CA-40051 and 2-CA-40102 is dismissed.

Issued, Washington, D.C., November 19, 1986.

J. L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[1] We do not agree with the General Counsel's argument in its exceptions that the Judge's findings amounted to a finding that the Union had waived its statutory right to demand bargaining as to ground rules.

[2] In so concluding, the Authority finds it unnecessary to, and specifically does not, adopt the Judge's comments (note 6) with regard to the interpretation of the parties' negotiated agreement.

(24 FLRA No. 12)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

. . . .

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, SOCIAL SECURITY
ADMINISTRATION, SOCIAL SECURITY
ADMINISTRATION OFFICE OF FIELD
OPERATIONS, NEW YORK REGION

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

Case Nos.: 2-CA-40051
2-CA-40102

. . . .

Thomas H. Gabriel, Esq.
For the Respondent

Cecelia McCarthy
For the Charging Party

Alfred R. Johnson, Jr.
For the General Counsel

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding arising under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq., 92 Stat. 1191 (hereinafter referred to as the Statute) and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410 et seq.

On November 11, 1983, American Federation of Government Employees, AFL-CIO (hereinafter called AFGE or the Union) filed a charge in Case No. 2-CA-40051 against the Department of Health and Human Services, Social Security Administration and Social Security Administration Office of Field Operations, New York Region (herein called Respondent or SSA). On December 2, 1983 AFGE filed a charge in Case No. 2-CA-40102 against SSA.

On January 25, 1984 AFGE filed a charge in Case No. 2-CA-40172 against SSA. On December 28, 1983 the General Counsel of the FLRA, by the Director for Region II, issued an Order Consolidating Cases, Complaint and Notice of Hearing, with respect to Case Nos. 2-CA-40051 and 2-CA-40102 alleging that SSA violated Sections 7116(a)(1) and (5) of the Statute by instituting a new audit procedure in its Mount Vernon, New York and South Bronx, New York Offices without affording AFGE an opportunity to bargain over the impact and implementation of the changes. On March 5, 1984 the Director of FLRA Region II approved a Settlement Agreement entered into by SSA and AFGE, with respect to Case Nos. 2-CA-40051 and 2-CA-40102. By letter dated July 25, 1984 the Director of FLRA Region II revoked the above described Settlement Agreement. On July 26, 1984 the General Counsel of the FLRA by the Director of Region II issued an Order Consolidating Cases, Complaint and Notice of Hearing in Case Nos. 2-CA-40051 and 2-CA-40102. SSA filed a timely Answer denying that it had violated the Statute with respect to Case Nos. 2-CA-40051 and 2-CA-40102. The Director of FLRA Region II issued a letter dated August 23, 1984 revoking a settlement agreement in Case No. 2-CA-40172. On August 28, 1984 General Counsel of the FLRA issued an Order Consolidating Cases, Amended Complaint and Notice of Hearing in Case Nos. 2-CA-40051, 2-CA-40102 and 2-CA-40172. Respondent filed a timely Answer to the Amended Complaint denying it had violated the Statute. On October 17, 1984 the Director of FLRA Region II issued an Order Severing Cases whereby Case No. 2-CA-40172 was severed from Case Nos. 2-CA-40102 and 40051.

A hearing was conducted with respect to Case Nos. 2-CA-40051 and 2-CA-40102 before the undersigned in New York City, New York. SSA, AFGE and General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Post hearing briefs have been filed and have been fully considered.

Based upon the entire record in this matter,1/ my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

Findings of Fact

Background

Prior to the alleged changes in the subject case, the employees received audits twice a year wherein the employees received advance

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1/ SSA and General Counsel of the FLRA filed a joint Motion to Strike certain portions of the transcript herein. AFGE stated it did not oppose this Motion. Accordingly the Motion To Strike is GRANTED, and Page 7, line 11 to Page 8, line 6 and Page 30, line 11 through Page 33, line 8 of the transcript for the first day of hearing are hereby stricken.

notice of the audits. Each employee had an opportunity, during this advance notice period, to review his pending cases and correct any errors or shortcomings. The employee's supervisor would then examine the cases in the employee's pending case load, which was at the employee's desk and, with the information readily available, the employee had an opportunity to explain any possible shortcomings.

The change in audit procedures involved the replacement of this biannual (semiannual) audit with a continuous audit. The continuous audit consisted of the employee's supervisor reviewing the employee's work through the use of the employee's aged case reports, which the employee hands in once a week. The supervisor also utilizes other reviews, such as security audits and pending case reviews. Utilizing all of these reviews and lists, the supervisor audits the employee's performance for his yearly evaluation. Under the continuous audit procedure the employee is not given advance notice of the audit nor an opportunity to examine his pending caseload and correct errors. Also, because the employee is unaware of when he will be audited until he reviews his biannual progress reviews based on the audits, it is difficult to rebut findings because the case files may no longer be readily available to the employee.

At all times material herein AFGE has been the collective bargaining representative for a nationwide unit of SSA employees including those employed in SSA's District and Branch offices. At all times material herein SSA and AFGE have been parties to a nationwide collective bargaining agreement. The employees that are the subject of this case, in the Mount Vernon Branch Office and South Bronx District Office, are included in this unit. AFGE delegated to the National Council of SSA Field Operations Locals (herein called the Council) authority to act as its representative for the purpose of collective bargaining with SSA for certain employees, including those that are the subject of this case. At all times material herein AFGE Local 3369 has acted as agent for the Council for the purpose of collective bargaining for, inter alia, SSA employees in the South Bronx District Office and Mount Vernon Branch Office.

Case No. 2-CA-40051 - Mount Vernon Branch Office

Prior to October 31, 1983 unit employees at SSA's Mount Vernon Branch Office were evaluated under the biannual audit system.

During the latter part of September 1983, Acting Office Manager Ron Sobel[2] met with the AFGE representative for the Mount Vernon Branch Office, Drew Stein, and discussed the future implementation of continuous audits. Stein indicated that he approved of the continuous audit system because it would be fairer than the two audit a year system.

2/ The Office Manager of the Mount Vernon Branch Office, Marie Sgaglione, was on extended maternity leave.

On Friday, October 28, 1983 Office Manager Sgaglione advised Stein that they would soon be implementing the continuous audit system. Stein indicated that he thought it was a good plan and that it gave a better overall view of employee performance and that he had no problem with it. Sgaglione advised Stein she would have a staff meeting the following Monday, October 31, 1983, to announce the implementation of the continuous audit system. Stein did not object to the notice being given to employees and he did not request to bargain about the change or its impact and implementation.

On Monday, October 31, 1983, just prior to 8:30 AM Stein told Sgaglione "off the record" that he had spoken to the President of AFGE Local 3369, Riordan, over the weekend and that the AFGE position is that there should have been some negotiation concerning the implementation of the continuous audit procedure. Because of the "off the record" nature of Stein's comment and because she had heard nothing "official" from AFGE Sgaglione held the staff meeting at 8:30 AM and announced the institution of the continuous audit procedure. Stein was present at the meeting and registered no objection. On November 4, 1983 Riordan telephoned Sobel, then on the labor relations staff at the SSA New York Regional Office. Riordan advised Sobel that Riordan had been advised by Stein that the management of the Mount Vernon Branch Office had told Stein that the continuous audit system was non-negotiable. Riordan told Sobel the system was negotiable. Sobel stated it was management's position that it was non-negotiable.

In making the foregoing findings of fact with respect to the institution of the continuous audit system in the Mount Vernon Branch Office I credit the testimony of Sgaglione and Sobel. I find that their testimony was corroborative of each others', was consistent with the surrounding circumstances and that their recollections were reliable and precise. I find the testimony of Stein was inconsistent with Riordan's testimony in a number of instances and that their testimony was somewhat confused and unreliable.

Case No. 2-CA-40102 - South Bronx District Office

On November 16, 1983, Riordan, President of AFGE Local 3369 and the acting local representative for the South Bronx, New York District Office, received the following letter dated November 9, 1983, from Vincent Hoist, District Manager of the South Bronx District Office.

> We will be adopting the continuous audit procedure for the new appraisal period which began on October 1, 1983.

By letter dated November 18, 1983 Riordan sent the following letter to Hoist:

> This acknowledges receipt November 16, 1983 of your letter dated November 9, 1983, concerning your proposal to adopt "the continuous audit procedure."

> Unfortunately, you neglected to define what you mean by "continuous audit procedure." The Union has no understanding what you mean by this new procedure. Please supply us with a complete definition and description of your proposal.
>
> Is your proposal intended to cover all positions or some?
>
> After receiving this information the Union will consult with you on your proposal.
>
> Implementation of this new procedure prior to consultation and negotiation is an unfair labor practice. I request that you not implement this new procedure until this process is completed.
>
> In the future, in advancing proposals, it would be more helpful if you would provide us with an explanation of the change when serving notice to the Union.

By letter dated November 28, 1983 Hoist replied to Riordan's letter of November 18, 1983 with the following:

> This is in response to your November 18, 1983 letter (received here on November 22, 1983).
>
> The continuous audit procedure is an ongoing review of an employee's performance.
>
> The procedure will cover all non-supervisory positions from GS-2 through GS-10.
>
> The basis for this procedure is Article 21, section 7a and b of the National Agreement which refers to informal discussions including reviews of performance.
>
> The target date was specified in my November 9, 1983 letter; namely, the new appraisal period which began on October 1, 1983. It will be used for informal discussions, and progress reviews.
>
> We will be in touch regarding a date for consultation on this matter.

Marvin Peck, a member of Hoist's staff, telephoned Riordan on December 6, 1983 to arrange a date for a consultation meeting as required by the national agreement. Riordan declined to set such a date because the unfair labor practice charge in Case No. 2-CA-40102 had already been filed.

The record established that the continuous audit system was implemented in the South Bronx District Office in February 1984.[3]

The Settlement Agreement

On March 2, 1984, the Respondent and the Charging Party entered into an informal Authority Settlement Agreement for the settlement of Case Nos. 2-CA-40051 and 2-CA-40102. This Settlement Agreement provided in part that, "The Respondent will discontinue the implementation of the new audit procedure to assess the performance of bargaining unit employees implemented in its Mount Vernon and South Bronx offices and will, upon request, negotiate with the American Federation of Government Employees concerning the implementation of the continuous audit review system for appraising employee performance and the impact of the change upon adversely affected employees."

On March 5, 1984 the Regional Director for Region II of the FLRA approved this Settlement Agreement. On or about March 12, 1984, Respondent's Assistant Regional Commissioner, Field Operations, Alex W. Bussey, sent the following letter to John Riordan:

> In accordance with the referenced settlement agreement which was approved by the Regional Director of FLRA Region II on March 5, 1984, management seeks to effect compliance as soon as possible.
>
> Your request, to bargain, if any, is requested by COB March 26, 1984, and should be directed to Mr. Howard M. Feuer, Area Director, Room 305, 237 Mamaroneck Avenue, White Plains, New York 10601. Telephone (914) 428-4430. Should you not exercise your right to request bargaining by this date, management will consider its obligations in this regard fully discharged.
>
> In the event bargaining is timely requested, Article 4, §1 of the Master Agreement requires the submission of proposals within a reasonable period of time. Your proposals, in the event bargaining is timely requested, are requested by COB April 8, 1984, and should be directed to Mr. Feuer. Should you timely request bargaining but not exercise your attendant right to submit written proposals by this date, management will consider its bargaining obligation fully discharged.
>
> If for any reason you or your designated representative cannot meet the time frames described above, please

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[3] This finding is based upon the credited testimony of employee Karen Albert and former employee Lester Guzman.

> contact Mr. Feuer to arrange for any extension of time necessary.
>
> Thank you for anticipated cooperation.

By letter dated March 26, 1984, Riordan submitted a written request to bargain concerning the management initiated change to a continuous audit procedure. In this letter, the Union also stated that it would shortly forward to the SSA proposals for ground rules. This letter was sent to Feuer, and received by him on March 27, 1984.

By letter dated March 27, 1984, Feuer responded to Riordan's March 26, 1984 letter and stated the following:

> As you know, Alex Bussey's letter of March 12, 1984 indicated that in the event that you wished to bargain on the impact and implementation of the continuous audit process your proposals are expected no later than COB April 8, 1984.
>
> The letter stated that, "In the event bargaining is timely requested, Article 4, paragraph 1 of the Master Agreement requires the submission of written proposals within a reasonable period of time." (April 8th).
>
> This is to advise you that I am awaiting your written proposals on the impact and implementation of the continuous audit process.
>
> If I do not receive your written proposals on the impact and implementation proposals by April 8th as stated in the ARC-FO's letter of March 12th, I will consider management's bargaining obligation fully discharged.

Riordan, by letter dated March 29, 1984, replied to Feuer's letter of March 27, 1984. In this letter Riordan stated the following:

> In regard to the bargaining request made by me March 26, 1984, over the management-initiated change to implement the continuous audit review system and your reply of March 27, 1984, received today, your unilateral deadline of April 8, 1984 for the submission of proposals is not accepted.
>
> Instead, the Union will submit proposals within a reasonable time frame as set in the ground rules which we can agree to.
>
> I will be forwarding the ground rules proposals shortly. Your cooperation will be appreciated.

By letter dated April 3, 1984, and addressed to Feuer, Riordan designated Local Vice President Cecelia McCarthy as the Union's chief negotiator and Local Vice President Evelyn Exman as a negotiator for the continuous audit negotiations. Riordan further stated that McCarthy would be forwarding ground rules proposals shortly and requested that SSA supply to the Union negotiators the names of its negotiators.

By letter dated April 4, 1984, the AFGE's chief negotiator, McCarthy, submitted to SSA its extensive proposals for ground rules[4] for negotiations and, in an attached letter, stated that the Union negotiating team could meet with SSA for negotiations for ten consecutive workdays from May 14, 1984 through May 25, 1984. The letter further stated that the negotiation team would be available to meet on April 23 and April 30, 1984 if Respondent refused to set aside 10 consecutive working days. McCarthy also stated that the Union would forward to Respondent substantive proposals a reasonable time before the first negotiation session. Also on this same date, McCarthy made an information request under Section 7114(b)(4) of the Statute for various documents pertaining to prior implementation of the continuous audit procedure.

By letter dated April 13, 1983, Feuer replied to McCarthy's letter of April 4, 1984. He acknowledged receipt of the Union's proposed ground rules and further stated that the proposals and her proposed dates for negotiations were under review.

On April 24, 1984, in a telephone conversation between McCarthy and Thomas H. Gabriel, identified in the correspondence as Thomas G. Hibschweiler, Senior Labor Relations Specialist for Respondent, McCarthy inquired as to when SSA would be responding to the Union's ground rules proposals. Gabriel responded that management would not be responding to the Union's ground rules proposals until the parties were at the table after the Union's substantive proposals had been received. Gabriel took the position that AFGE had to supply substantive proposals before the Respondent would set up a meeting to negotiate with the Union on the topic of the continuous audit procedure in the South Bronx and Mount Vernon Offices. In this telephone conversation, Gabriel informed McCarthy that Respondent intended to reimplement the continuous audit procedure at its Mount Vernon and South Bronx, New York Offices on May 14, 1984.

By letter dated April 26, 1984, McCarthy wrote a confirming letter to the Respondent which recounted McCarthy's version of the April 24, 1984 telephone conversation between herself and Gabriel. In this letter, McCarthy noted that (a) the May 14, 1984 implementation date chosen by SSA had been given by the Union as a possible date for negotiations; and (b) SSA would not provide the Union with the names of its negotiators or dates to commence negotiations.

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[4] The ground rules proposals consisted of 2 pages and 10 articles.

By letter of April 26, 1984, Bussey outlined SSA's position concerning the negotiation of the implementation of a continuous audit procedure in the affected offices. This letter stated, in part:

> The message of April 23, together with the referenced conversation of April 24, also served to inform you that the agency will fully implement the continuous audit system in the two offices beginning May 14. At your request, you were informed that the May 14 date was chosen to permit management to timely discharge its obligation to conduct documented progress reviews as required by the National Agreement.
>
> Local 3369 has previously and repeatedly been notified of the need to expeditiously conclude negotiations associated with the continuous audit procedures. In this regard, the National Agreement, at Article 4, §1, §2, mandates the submission by the union of "written proposals if applicable within a reasonable period after notice of the proposed change." To date, the union has declined to submit any proposals addressing the impact and implementation of the change.
>
> Your attempt to unilaterally impose a modification of the referenced contractually-determined timeframe for submission of the union's proposals, as described in your letter dated April 4 to Howard Feuer, cannot be accepted. In the event the union chooses to serve negotiable proposals, bargaining will commence as soon as possible.
>
> This letter should not be construed as managerial consent to extension of any contractually-determined timeframes, including the obligation of the union to serve written proposals within a reasonable period of notice of a change.

By letter dated April 30, 1984 McCarthy responded to Bussey's April 26, 1984 letter. In this letter McCarthy stated the following:

> In reference to the "need" to implement the continuous audit system on May 14, 1984, which you allege is necessitated by the National Agreement, I addressed this point with Mr. Hibschweiler on April 24. He had initially claimed that it was a contractual mandate that Progress Reviews were due by May 1984. However, he could not reference which portion of the contract applies. In fact, if the offices in question will be conducting Progress Reviews in May, then, it would be

> appropriate to postpone implementation of the continuous audit system until all negotiations have been completed. In the interim period, the current system of performance appraisal in both the Mount Vernon Branch Office and the South Bronx District Office should be utilized for the proposed Progress Reviews.

By letter dated May 4, 1984, Bussey responded to McCarthy's letter of April 26, 1984. In this letter SSA stated that the AFGE was at fault for any delay in the commencing of negotiations by its failure to submit impact and implementation proposals and to submit a timely bargaining request. Although the letter stated that SSA would designate negotiators upon receipt of substantive proposals and negotiate as soon as possible, the letter also stated that SSA reserved the right to contest the timeliness of the Union's request to bargain and of its service of proposals pursuant to the limits described in the National Agreement.

By letter dated May 8, 1984, McCarthy notified SSA that the AFGE's position regarding the negotiations had not changed and it would place these issues before the Federal Labor Relations Authority.

On or about May 14, 1984, SSA reimplemented the continuous audit procedure in its Mount Vernon, New York Branch Office and reimplemented this procedure at its South Bronx, New York District Office on May 18, 1984.

By letter dated July 25, 1984 the Regional Director for Region II of the Authority revoked the Settlement Agreement alleging that Respondent's May 14 and 18 reimplementation of the continuous audit procedure violated the Settlement Agreement.

Article 4, section 1 of the parties' National Agreement states the following:

> The Administration will provide the Union reasonable advance notice prior to implementation of changes affecting conditions of employment subject to bargaining under 5 USC 71. Upon notice from the Administration of a proposed change, the designated union representative will notify the designated management representative of its desire to consult and/or negotiate on the change.
>
> The Union will submit written proposals if applicable within a reasonable period after notice of the proposed change. Bargaining will begin as soon as possible, and will not exceed ten (10) working days. All issues not resolved at that time may be referred to the Federal Service Impasses Panel for resolution under its rules.

Discussion and Conclusions of Law

The threshold issue to be resolved is whether SSA violated its Settlement Agreement. Soon after entering into the Settlement Agreement SSA advised AFGE, by letter of March 12, 1984, that pursuant to the terms of the Settlement Agreement SSA was advising the Union that if AFGE wished to bargain it should request to do so by close of business March 26, 1984 and, pursuant to Article 4, §1 of the Master Agreement, the Union should submit written proposals promptly, by close of business April 8, 1984. By the foregoing, SSA advised the AFGE of the impending change and that it should request to bargain promptly and then submit written proposals. SSA was in fact declaring itself ready to negotiate concerning any Union proposals. The record establishes, however, that, although AFGE stated it wished to bargain, AFGE engaged in conduct and communications more designed to forestall and frustrate negotiations than to facilitate them. The conduct of the parties must be evaluated in light of the actual circumstances and the situation. Thus, whereas SSA was trying to extract AFGE's proposals with respect to the impact and implementation, AFGE seemed more interested in delay and in raising obstacles than in prompt negotiations concerning the impact and implementation of the change in this audit system.

In considering the conduct of the parties it must be recognized that collective bargaining is a dynamic and functioning relationship that must be judged in light of the overall circumstances present. The conduct can not effectively be viewed in terms of a series of per se rules and obligations. Thus, although normally when negotiating an entire collective bargaining agreement, a union might reasonably insist upon reaching agreement on extensive ground rules before it makes any substantive proposals and counterproposals,[5] such is not the situation herein. In the instant case the parties were dealing not with an entire new collective bargaining, rather management was changing one condition, the audit system, and the parties in their national agreement had agreed upon a relatively expedited procedure for dealing with impact and implementation bargaining concerning changes in employment conditions. The parties agreed that upon notification of such a change the Union will notify SSA of its desire to negotiate and will submit written proposals within a reasonable time after the notice of the change and the bargaining will begin as soon as possible and will not exceed ten days. It is clear the parties were trying to set forth an expedited and a short procedure for dealing with changes. The Union, in the subject case, tried to comply with the language of the agreement by submitting extensive ground rule proposals, while frustrating the clear object of the agreement.[6]

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[5] Cf. Department of Health and Human Services, Region VII, Kansas City, Missouri, 14 FLRA No. 46 (1984); Department of Defense, Dependent Schools, 14 FLRA No. 40 (1984).

In the subject situation, depending upon the Union's substantive proposals and the amount of negotiations necessary, extensive ground rules might have been unnecessary. Such a determination could only be made after the substantive proposals could be considered.

Thus I conclude that, in the circumstances here present, SSA's insistence on receiving AFGE's substantive proposals regarding the impact and implementation of the change, before negotiating concerning the Union's rather intricate and extensive ground rule proposals, did not constitute a refusal to negotiate concerning the impact and implementation of the change and, therefore, did not violate the terms of the Settlement Agreement.

Because I have concluded that SSA did not violate the Settlement Agreement, the Regional Director for Region II was not justified in setting it aside and issuing the Consolidated Complaint herein.[7] Having concluded that SSA did not violate the Settlement Agreement, that the Settlement Agreement should not have been set aside and that the Consolidated Complaint herein should not have been issued, it is recommended that the Authority issue the following Order:

ORDER

IT IS ORDERED that the Consolidated Complaint in Case Nos. 2-CA-40051 and 2-A-40102 be, and hereby is, dismissed.

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: July 26, 1985
Washington, DC

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[6] In this regard the agreement required the Union to "submit written proposals", not written substantive proposals or written ground rule proposals. Presumably the Union was to submit "all" its proposals. To break the proposals up and submit them at various times, etc. would not have complied with the requirements of the agreement.

[7] In light of this conclusion, I need not make any conclusions with respect to the allegations that SSA violated the Statute by unilaterally instituting the changed audit system in 1983 in the Mount Vernon and South Bronx Offices.

CORRECTED COPY

24 FLRA No. 13

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION
NORTHEASTERN PROGRAM SERVICE CENTER

Respondent

and

Case No. 2-CA-30643
(19 FLRA No. 108)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1760, AFL-CIO

Charging Party

DECISION AND ORDER ON REMAND

I. Statement of the Case

This case is before the Authority pursuant to a remand from the United States Court of Appeals for the Second Circuit. American Federation of Government Employees, Local 1760 v. FLRA, 786 F.2d 554 (2d Cir. 1986). The question in this case is whether it was an unfair labor practice under the Federal Service Labor-Management Relations Statute (the Statute) for the Respondent (Agency) to refuse a request, made pursuant to section 7114(b)(4) of the Statute, to provide the Charging Party (Union) with the home addresses of employees of the Respondent who are part of a national, exclusive bargaining unit represented by the American Federation of Government Employees.

In a recent Decision and Order on Remand in another case, Farmers Home Administration Finance Office, St. Louis, Missouri, 23 FLRA No. 101 (1986) (FHAFO), we reviewed the Authority's previous decision concerning the release of the names and home addresses of bargaining unit employees to exclusive representatives. We concluded that the release of the information is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets all of the other requirements established by section 7114(b)(4). We also determined that the release of the information is generally required without regard to whether alternative means of communication are available. Consistent with our decision on remand in FHAFO, with the Second Circuit's reversal of our previous decision in this case, and with the Administrative Law Judge's decision in this case, we conclude that the Respondent's refusal to provide the Union with the home addresses of bargaining unit employees violated section 7116(a)(1), (5) and (8) of the Statute.

II. Facts

The Union acts as the representative of the Respondent's employees as part of a nationwide bargaining unit. The Union requested the names and home addresses of the unit employees it represents. The Respondent denied the request for the home addresses on the grounds that the release of such information would violate the Privacy Act; that the information was not readily available because it would require the compilation of addresses from many sources; and that the Union had not established why the information was relevant and necessary.

III. Administrative Law Judge's Decision

The Judge concluded that the Respondent failed to comply with the requirements of section 7114(b)(4) of the Statute in violation of section 7116(a)(1), (5) and (8) when it refused to provide the Union, upon request, with the home addresses of the unit employees. In reaching that conclusion, the Judge found that: (1) the information was relevant and necessary for the Union to communicate effectively with the unit employees in order to formulate proposals for collective bargaining purposes; (2) no undue burden would be imposed on the Respondent to extract the information from sources that were reasonably available; (3) the alternative means of communication that were available to the Union did not provide appropriate and reliable access to the employees; and (4) the Privacy Act[1] was not a bar to disclosure of the information.

IV. Positions of the Parties

The parties' positions were set forth in the Respondent's exceptions and the General Counsel's response in the original case. The Respondent contended that the Judge's conclusion that an agency must provide a union with home addresses of bargaining unit employees unless alternative access to the information exists and is equal to the access which could be achieved through the use of home addresses is unsupported by section 7114(b)(4) of the Statute. The Respondent also excepted to the Judge's conclusion that the Privacy Act did not bar disclosure of the information. Finally, the Respondent contended that the disclosure of home addresses would violate employees' rights under section 7102 of the Statute to refrain from activity supporting a labor organization.

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[1] Privacy Act of 1974, 5 U.S.C. § 552a (1982).

The General Counsel argued that the Judge's decision was correct and urged the Authority to adopt his findings.

V. Previous Decision of the Authority

In its previous decision in this case, Social Security Administration, Northeastern Program Service Center, 19 FLRA No. 108 (1985), the Authority followed the precedent established in the original decision in the FHAFO case, 19 FLRA No. 21 (1985). The Authority found, contrary to the Judge, that the Respondent did not commit an unfair labor practice when it denied the Union's request for the unit employees' home addresses. The Authority ruled that release of the information was "prohibited by law," specifically the Privacy Act. The Union appealed. American Federation of Government Employees, Local 1760 v. FLRA, No. 85-4144 (2d Cir.). The Authority requested that the court remand the case to address whether disclosure of the information sought by the Union was "prohibited by law," i.e., the Privacy Act, because of the applicability of the Privacy Act's "routine use" exception, 5 U.S.C. 552a(b)(3), and such other issues arising under the Statute as might be appropriate.[2] The court denied the Authority's request and issued a decision.

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[2] The Authority also sought remands in three other cases then pending in other circuits presenting substantially identical issues. The review proceedings involved were American Federation of Government Employees, Local 3354 v. FLRA, No. 85-1493 (D.C. Cir.) (reviewing the Authority's original decision in the FHAFO case, 19 FLRA No. 21); Philadelphia Metal Trades Council v. FLRA, No. 85-1625 (D.C. Cir.) (reviewing 19 FLRA No. 107); and National Federation of Federal Employees, Local 1827 v. FLRA, No. 85-2202 (8th Cir.) (reviewing 19 FLRA No. 85). The courts granted the Authority's motions for remand in those cases.

VI. Decision of the Second Circuit

The court reversed the Authority's holding that the release of the employees' home addresses was "prohibited by law," i.e., the Privacy Act, under section 7114(b)(4) of the Statute. The court agreed with the Authority that it was necessary to apply a balancing test under exemption (b)(6) of the Freedom of Information Act (FOIA),[3] to resolve the case, but found that the "privacy interest of the average employee in his address is not particularly compelling." AFGE Local 1760, 786 F.2d at 556. The court noted Congress' determination that collective bargaining is in the public interest and also noted its prior holdings in private sector cases that the mere existence of alternative means of communication with unit employees is not sufficient to justify the refusal of a union's request for home addresses. The court agreed with the Administrative Law Judge in this case that the alternative means of communication available to the Union were inadequate, and that the other requirements for the release of home addresses pursuant to section 7114(b)(4) of the Statute had been met. The court therefore remanded this case to the Authority to find a violation and require the Respondent to disclose the unit employees' home addresses to the Union. The court did not address the "routine use" issue.

The Authority decided to review the entire issue of the release of employees' names and home addresses, and invited agencies, unions, and interested persons to submit amicus briefs addressing the issue. A number of amicus submissions were received. Although the parties in this case did not submit amicus briefs, the Department of Health and Human Services and the American Federation of Government Employees did file amicus briefs outlining their positions.

VII. Analysis and Conclusion

As noted above, the Authority in the decision on remand in FHAFO concluded that the release of the names and home addresses of bargaining unit employees to the exclusive representative of those employees is not prohibited by law, is necessary for unions to fulfill their duties under the

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[3] Freedom of Information Act, 5 U.S.C. §552 (1982).

Statute, and meets the other requirements of section 7114(b)(4). We determined that agencies are required to furnish such information without regard to whether alternative means of communication are available. Based on the court's decision in this case and our decision on remand in the FHAFO case, we find that the Respondent was required to furnish the Union with the home addresses of the employees in the bargaining unit. Further, we find that the home addresses of the unit employees are reasonably available to the Respondent and that it would not place an undue burden on the Respondent to provide the Union with the information requested. Finally, we conclude that the Respondent's refusal to furnish the requested information in this case constituted a violation of section 7116(a)(1), (5) and (8) of the Statute.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is ordered that the Social Security Administration, Northeastern Program Service Center, shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request by the American Federation of Government Employees, Local 1760, AFL-CIO, the exclusive representative of its employees, the home addresses of all employees in the bargaining unit it represents.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request by the American Federation of Government Employees, Local 1760, AFL-CIO, the exclusive representative of its employees, furnish it with the home addresses of employees in the bargaining unit it represents.

(b) Post at all its facilities where bargaining unit employees represented by the American Federation of Government Employees, Local 1760, AFL-CIO are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a senior official of the Social Security Administration, Northeastern Program Service Center, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., November 19, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(24 FLRA No.13)

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request by the American Federation of Government Employees, Local 1760, AFL-CIO, the exclusive representative of our employees, the home addresses of all employees in the bargaining unit it represents.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request by the American Federation of Government Employees, Local 1760, AFL-CIO, the exclusive representative of our employees, furnish it with the home addresses of all employees in the bargaining unit it represents.

____
(Activity)

Dated:__________ By:______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region II, Federal Labor Relations Authority, whose address is: 26 Federal Plaza, Room 3700, New York, N.Y. 10278 and whose telephone number is: (212) 264-4934.

9/Case No. 405

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Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 405 REPORT OF CASE DECISIONS November 21, 1986

UNFAIR LABOR PRACTICE CASES

24 FLRA No. 22 (November 21, 1986)

Defense Mapping Agency, Washington, D.C and Defense Mapping Agency Aerospace Center, St. Louis, Missouri and National Federation of Federal Employees, Local 1827, Case No. 7-CA-50623

24 FLRA No. 20 (November 21, 1986)

Arlington National Cemetery ANCIV-MMC and National Association of Government Employees, Local R4-93, SEIU, AFL-CIO, Case No. 3-CU-60007

NEGOTIABILITY CASES

24 FLRA No. 16 (November 21, 1986)

National Association of Agriculture Employees and U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine Program, Case No. 0-NG-1280

24 FLRA No. 17 (November 21, 1986)

National Association of Government Employees, Local R14-8 and Veterans Administration Medical Center, Topeka, Kansas, Case No. 0-NG-1218

24 FLRA No. 21 (November 21, 1986)

National Association of Government Employees, SEIU, AFL-CIO and Veterans Administration Medical Center, Grand Junction, Colorado, Case No. 0-NG-1211

Y3.F31/21-3:

*Case No. O-NG-1172 (Order Denying Motion for Reconsideration of 23 FLRA No. 29)

American Federation of Government Employees, AFL-CIO, Council of Prison Locals, Local 171 and Department of Justice, Federal Prison System, Federal Correctional Institution, El Reno, Oklahoma

ARBITRATION CASES

24 FLRA No. 14 (November 20, 1986)

Pine Bluff Arsenal, Pine Bluff, Arkansas and American Federation of Government Employees, Local 953 (Allen, Jr. Arbitrator), Case No. O-AR-1231

24 FLRA No. 15 (November 21, 1986)

Local 1749, American Federation of Government Employees and Commander, 47FTW, Laughlin Air Force Base, Texas (Tyer, Arbitrator), Case No. O-AR-1209

24 FLRA No. 18 (November 21, 1986)

Local 12, American Federation of Government Employees, AFL-CIO and U.S. Department of Labor (Lipton, Arbitrator), Case No. O-AR-1081

24 FLRA No. 19 (November 21, 1986)

American Federation of Government Employees, Local 12 and U.S. Department of Labor (Lubic, Arbitrator), Case No. O-AR-1070

*NOTE Bound volume page numbers will not be assigned to the decisions marked with an asterisk at this time.

Federal Labor Relations Authority

24 FLRA No. 14

Pine Bluff Arsenal, Pine Bluff Ark. and AFGE, Local 953 (Allen, Arbitrator), Case No. 0-AR-1231 (Decided November 20, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
ARBITRATION, PROCEDURE TIMELINESS IMPROPER FILING AT A FLRA REGIONAL OFFICE	7122(a) and (b)

DIGEST NOTES

The Authority dismissed the union's exceptions to an arbitration award as untimely filed because they failed to comply with sections 2425.1, 2429.21 and 2429.22 of the Authority's rules and regulations, applicable to the computation of time limits. The exceptions were received by regular mail at a FLRA regional office before the statutory due date for filing exception. The regional office exercised due diligence in forwarding them to the Authority's national office but the exceptions arrived at the national office after the due date for filing. It is well established that exceptions to an arbitrator's award cannot be filed at a regional office, but must be filed with the Authority at its national office in Washington, D.C.

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Federal Labor Relations Authority

24 FLRA No. 15

Local 1749, AFGE and Commander, 47FTW, Laughlin Air Force Base, Tex. (Tyer, Arbitrator), Case No. 0-AR-1209 (Decided November 21, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
ARBITRATION AWARDS, MODIFIED OR SET ASIDE	7122(a)

- ARBITRATION AWARDS, MODIFIED OR SET ASIDE
  - AWARD CONTRARY TO APPLICABLE LAW
    - 5 U.S.C. 7701(g)
- ARBITRATION AWARDS, REMEDIES ORDERED BY ARBITRATORS
  - ATTORNEY FEES
  - BACKPAY
- ARBITRATION AWARDS, REVIEW OF, EXCEPTIONS ASSERTED IN APPEAL
  - AWARD CONTRARY TO APPLICABLE LAW
    - 5 U.S.C. 7701(g)
- ATTORNEY FEES
  - ARBITRATION AWARDS
    - SET ASIDE
    - AUTHORITY WILL SET ASIDE OR MODIFY DEFICIENT AWARDS
  - REQUIREMENTS FOR AN AWARD OF ATTORNEY FEES
- BACKPAY
  - SUSPENSION NOT FOR JUST CAUSE
- DISCIPLINE OF EMPLOYEES
  - JUST CAUSE
  - SUSPENSION
    - NOT FOR JUST CAUSE
- UNITED STATES CODE
  - 5 U.S.C. 5596 [BACK PAY ACT]
  - 5 U.S.C. 7701(g)

DIGEST NOTES

The issue submitted to arbitration was whether the 14-day suspension of the grievant, a government procurement agent, for alleged deliberate misrepresentation and concealment of a material fact in the purchase of certain merchandise, was for just cause under the terms of the parties' collective bargaining agreement and applicable regulations. The arbitrator found that the suspension was not for just cause and ordered that the grievant be made whole for all backpay and other benefits lost

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

due to the adverse action. The arbitrator further ordered that the grievant be reimbursed for all attorney fees and other related expenses.

In its exceptions, the agency contended that the award of attorney fees is contrary to 5 U.S.C. section 7701(g)(1). That section, applicable to all cases except those of discrimination, requires that an award of attorney fees must be warranted "in the interest of justice," that the amount must be reasonable, and that the fees must have been incurred by the employee. The standards established under 7701(g) further require fully articulated, reasoned decisions setting forth the specific findings supporting the determination on each pertinent statutory requirement. The Authority held that an arbitrator's cursory statement, as in this case, that the arbitrator considered the necessary elements of analysis does not meet the requirements of 5 U.S.C. section 7701(g). Rather, an arbitrator's award of attorney fees must draw its essence from a demonstrable, pragmatic analysis of the factors set out in applicable statutes. Furthermore, the Authority will not remand deficient attorney fee awards to the parties for clarification and interpretation, but will either set aside or modify such awards. In this case, the Authority found the award of attorney fees deficient and modified the arbitration award by setting aside the award of attorney fees.

Federal Labor Relations Authority

24 FLRA No. 16

NAGE and Dep't of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine Program, Case No. 0-NG-1280
(Decided November 21, 1986)

SUBJECT MATTER INDEX ENTRIES

CODE OF FEDERAL REGULATIONS
   41 C.F.R. 101-7
COMPTROLLER GENERAL DECISIONS
   46 COMP. GEN. 21 (1966)
OFFICIAL TIME [7131]
   TRAVEL AND PER DIEM
      FEDERAL TRAVEL REGULATIONS [41 CFR PART 101- 7]
      FOR BARGAINING ACTIVITIES
      CONDITION OF EMPLOYMENT
      TRAVEL EXPENSE ACT [5 U.S.C. 5701 ET SEQ.]
UNITED STATES CODE
   5 U.S.C. 5701 ET SEQ. [TRAVEL EXPENSE ACT]

STATUTE

7101(b)
7103(a)(14)(C)
7105(a)(2)(E)
7114(c)(4)

DIGEST NOTES

A provision is negotiable that provides for negotiations over travel and per diem expenses for union representatives engaged in bargaining and related activities. The proposal concerns a condition of employment. Payment of travel and per diem expenses is not inconsistent with either the Travel Expense Act [5 U.S.C. section 5710 *et seq.*] or the Federal Travel Regulations [41 C.F.R. Part 101-7] as interpreted by the Comptroller General [46 Comp. Gen. 21 (1966)]. Agencies have discretion to make determinations that travel in the context of union activity is sufficiently within the interest of the Government to constitute official business. Following this determination, otherwise proper travel and per diem expenses may be paid from agency funds. Moreover, proposal providing for payment of travel and per diem expenses for union representatives would not prevent management from making individual case-by-case determinations as to the propriety under the FTRs of authorizing particular payments. Finally, there is no basis for altering the finding that travel and per diem is negotiable in the agency's argument that the provision is inconsistent with section 7101(b). The agency argued that whatever action it takes would involve it in "lengthy and costly litigation," which is contrary to the accomplishment of an effective and efficient government.

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Federal Labor Relations Authority

24 FLRA No. 17

NAGE, Local R14-8 and VA
Medical Center, Topeka,
Kansas, Case No. 0-NG-1218
(Decided November 21, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
ASSIGN WORK, RESERVED MANAGEMENT RIGHT	7105(a)(2)(E)
HOURS OF WORK	7106(a)(2)(A) and (B)
TRAINING	7131(d)
CODE OF FEDERAL REGULATIONS	
5 C.F.R. 610.121	
DIRECT EMPLOYEES, RESERVED MANAGEMENT RIGHT	[7106(a)(2)(A)]
TRAINING	
HOURS OF WORK	
DAYS OFF	
CONSECUTIVE DAYS OFF REQUIREMENT	
MEAL PERIODS	
RESTRICTIONS FROM REQUIRING MEALS DURING SPECIFIED HOURS	
SHIFT ASSIGNMENTS	
FREQUENCY OF CHANGES IN SHIFT ASSIGNMENTS	
INTERVAL BETWEEN SHIFTS	
STARTING AND QUITTING TIMES	
MANAGEMENT RIGHTS: GENERALLY	
CONDITIONING RIGHT ON THE PRIOR EXERCISE OF OTHER RIGHTS	
PERFORMANCE APPRAISAL SYSTEM	
POSITION DESCRIPTION	
PROHIBITION ON EVALUATING FOR DUTIES NOT IN PD	
TRAINING	
NO EVALUATIONS ON DUTIES WHERE NOT TRAINED	
UNITED STATES CODE	
5 U.S.C. 5543	

DIGEST NOTES

A proposal is negotiable that concerns adjusting the starting and quitting times of union officials when they are processing grievances involving an employee on a shift other than their own The proposal does not interfere with the agency's right to assign work under section 7106(a)(2)(B). Rather, the proposal merely concerns the times when the union official will perform assigned duties. The proposal would permits the agency to consider its staffing workload requirements when acting on

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requests for adjustments in starting and quitting times. Also, contrary to the agency's allegation, there is no basis to conclude that the union's proposal constitutes a grant of compensatory time. Finally, the proposal does not require the agency to schedule employees in a manner other than that required by 5 C.F.R. section 610.121. (proposal 1)

A proposal is nonnegotiable that would prohibit the agency from scheduling an employee to work on a shift if that employee had worked during the previous eleven hours or to schedule an employee for two different tours of duty in the same week. Such requirements places a limitation upon the agency's exercise of its right to assign work and could prevent the agency from determining what duties were to be performed on what shift in violation of section 7106(a)(2)(B). (proposal 2)

A proposal is negotiable that requires the agency to "ordinarily" provide consecutive days off to employees. The proposal would not require consecutive days off where the agency determines that the requirement adversely affects work requirements. Accordingly the proposal is not inconsistent with 5 C.F.R. section 610.121, a Government-wide regulation, which requires agencies to schedule employees consistent with actual work requirements. (proposal 3)

A proposal is negotiable which provides that employees "ordinarily" will not be required to eat their meals during the 6:00 p.m. to 6:00 a.m. period. The agency may require the meal period to occur during the specified hours if necessary. (proposal 4)

A proposal is negotiable to the extent that it precludes an agency from evaluating employees for duties that are beyond the scope of the employees' position description. Such a proposal would not prevent an agency from evaluating employees on any particular duties since the agency could always add the functions upon which it wished to evaluate employees to the employees' position descriptions. (proposal 5)

A proposal is outside the duty to bargain to the extent that it would prevent the agency from holding an employee responsible for those duties for which it has not provided training. Proposals are outside the duty to bargain that condition the agency's exercise of one of its reserved rights upon the prior exercise of another of its rights. In this case, the proposal would condition the agency's determination of the duties and functions upon which employees' performance would be appraised, an exercise of its right to direct employees and assign work under section 7106(a)(2)(A) and (B), upon its exercise of its right to assign work (training). (proposal 5)

Federal Labor Relations Authority

24 FLRA No. 18

Local 12, AFGE and Dep't of Labor (Lipton, Arbitrator), Case No. 0-AR-1081 (Decided November 21, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
APPOINTMENTS, SELECTION FOR	7106(a)(2)(C)
MANAGEMENT'S RIGHT ABRIDGEMENT	7122(a)
ARBITRATION AWARDS, MODIFIED/ SET ASIDE	
AWARD CONTRARY TO APPLICABLE LAW	
5 U.S.C. 5596 [BACK PAY ACT]	
AWARD CONTRARY TO THE FSLMR STATUTE	
7106(a)(2)(C)	
ARBITRATION AWARDS, REVIEW OF, EXCEPTIONS ASSERTED IN APPEAL	
ARBITRATOR FAILED TO CONDUCT A FAIR HEARING [BY:]	
REFUSING TO HEAR PERTINENT AND MATERIAL EVIDENCE	
AWARD CONTRARY TO APPLICABLE LAW	
5 U.S.C. 5596 [BACK PAY ACT]	
AWARD CONTRARY TO THE FSLMR STATUTE	
7106(a)(2)(C)	
LAW NOT SPECIFIED	
ARBITRATION AWARDS, REVIEW OF, NO BASIS FOR REVIEW	
DISAGREEMENT WITH ARBITRATOR'S EVALUATION OF THE EVIDENCE	
DISAGREEMENT WITH ARBITRATOR'S REASONING AND CONCLUSIONS	
ARBITRATION AWARDS, REMEDIES ORDERED BY ARBITRATORS	
BACKPAY	
REINSTATE GRIEVANT	
ATTORNEY FEES	
REQUIREMENTS FOR AN AWARD	
BACKPAY	
CRITERIA FOR BACKPAY AND RETROACTIVE PROMOTIONS	
UNWARRANTED OR UNJUSTIFIED PERSONNEL ACTION	
FEDERAL PERSONNEL MANUAL	
CHAPTER 335	
POSITION, FILLING OF	
ARBITRATION AWARD	
INSTATEMENT OF EMPLOYEE WHO HAD VOLUNTARILY RESIGNED	
PRIORITY OR PREFERENTIAL TREATMENT	
CORRECTIVE ACTION	

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

PROMOTION
CAREER-LADDER PROMOTION
OBLIGATION TO EMPLOYEE
PROVIDE GRADE-BUILDING EXPERIENCE
UNITED STATES CODE
5 U.S.C. 5596 [BACK PAY ACT]
5 U.S.C. 7701(g)

DIGEST NOTES

The grievant voluntarily resigned after he had filed a grievance contending that he was denied a career ladder promotion to GS-6 because of sex, race and union activities and that he was harassed. The arbitrator found that the allegations of discrimination and harassment were not supported by the evidence, and ruled that the grievant's level of performance did not qualify him for a promotion to GS-6. Although the arbitrator found that the agency failed to meet its obligation under the agreement to provide the grievant with grade-building experience and developmental opportunity, he also noted that the evidence did not establish a reasonable probability that the grievant would have been promoted even if that experience had been provided. As his award the arbitrator ordered the agency to offer the grievant "instatement" in the GS-5 career ladder position with the potential for promotion to GS-6 with retroactive pay if the grievant were promoted.

In its first exception the agency contended that the award conflicts with its rights to select under section 7106(a)(2)(C) because it requires the agency to offer the grievant the GS-5 position from which he resigned. The Authority agreed with the agency that the award was deficient. Management's right to make selections for appointment can be abridged only if the arbitrator finds a direct connection between improper agency action and the failure of a specific employee to be selected. The arbitrator did not find that the failure to provide the grievant with grade-building experience directly resulted in the denial of the career ladder promotion.

The agency also contended that the award was contrary to the Back Pay Act, 5 U.S.C. section 5596. The arbitrator did not find that an improper agency action directly resulted in the denial of the grievant's promotion or in his resignation from his GS-5 position. Since the arbitrator did not find that but for an unjustified or unwarranted personnel action the grievant would not have suffered a withdrawal or reduction in pay, allowances or differentials, the Authority held the award to be contrary to the Back Pay Act.

The union excepted to the award by alleging that the denial of its request for attorney fees was contrary to law. However, an arbitrator is authorized to award attorney fees under the terms of the Back Pay Act only in conjunction with an award of backpay on the correction of an unjustified or unwarranted personnel action. Further, the award of attorney fees must be in accordance with the standards established under 5 U.S.C. section 7701(g). In this case the arbitrator's award failed to meet the requirements of the Back Pay Act and accordingly, there was no basis for an award of backpay or attorney fees under the Act.

In its second exception, the union contended that the award was deficient because the arbitrator denied it a fair hearing by improperly rejecting evidence and by misunderstanding key factual matters. The Authority held tnat the union failed to establish that it was denied a fair hearing and concluded that the union's second exception constitutes nothing more than disagreement with the arbitrator's reasoning and conclusions and with his evaluation of the evidence and testimony presented.

The Authority noted that while the agency's exceptions provided a basis for finding the award deficient as contrary to section 7106(a)(2)(C), the arbitrator made a valid finding that the agency violated the agreement when it failed to provide the grievant with grade-building experience. Also, the Authority noted that priority consideration under FPM Chapter 335 is available as corrective action in a variety of situations in which employees have been found to be wrongfully denied the consideration or process to which they are entitle. Accordingly, the Authority modified the award to provide the grievant with priority consideration for selection.

Federal Labor Relations Authority

24 FLRA No. 19

AFGE, Local 12 and Dep't of Labor (Lubic, Arbitrator), Case No. 0-AR-1070 (Decided November 21, 1986)

SUBJECT MATTER INDEX ENTRIES

- ARBITRATION AWARDS, EXCEPTIONS
  - AWARD CONTRARY TO THE FSLMR STATUTE
    - 7106(a)(2)(A)
    - 7106(a)(2)(B)
  - AWARD CONTRARY TO APPLICABLE LAW
    - 29 U.S.C. 707 *ET SEQ*. [REHABILITATION ACT OF 1973]
- ASSIGN EMPLOYEE, RESERVED MANAGEMENT RIGHT [7106(a)(2)(A)]
  - HEALTH AND SAFETY
- ASSIGN WORK, RESERVED MANAGEMENT RIGHT [7106(a)(2)(B)]
  - HEALTH AND SAFETY
- CODE OF FEDERAL REGULATIONS
  - 29 C.F.R. 1613.703
  - 29 C.F.R. 1613.704
  - 29 C.F.R. 1613.704(b)
  - 29 C.F.R. 1613.704(c)
- HEALTH AND SAFETY
  - HANDICAPPED EMPLOYEES
    - REASONABLE ACCOMMODATION FOR MEDICAL CONDITION
  - VIDEO DISPLAY TERMINAL
    - REASONABLE ACCOMMODATION FOR VISUALLY HANDICAPPED EMPLOYEES
- MANAGEMENT RIGHTS: GENERALLY
  - ACCOMMODATIONS BETWEEN CONFLICTING RIGHTS AND OBLIGATIONS
    - REASONABLE ACCOMMODATIONS FOR HANDICAPPED EMPLOYEES
- MERIT SYSTEM PROTECTION BOARD [MSPB]
  - SPECIAL PANEL FOR RESOLVING DISPUTES BETWEEN MSPB AND EEOC
    - REASONABLE ACCOMMODATION FOR HANDICAPPED EMPLOYEES
- PROMOTION
  - REPROMOTION
    - HARMFUL ERROR: FAILING TO PUT GRIEVANT ON REPROMOTION LIST
- UNITED STATES CODE
  - 29 U.S.C. 701 *ET SEQ*. [REHABILITATION ACT OF 1973]
  - 5 U.S.C. 7702

STATUTE

7106(a)(2)(A) and (B)
7122(a)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

DIGEST NOTES

The grievant was downgraded as the result of a reduction-in-force from a secretary/typist position to a clerk/typist position. She filed a grievance alleging that she was improperly placed in the position and also that she was unable to work at a video display terminal (VDT) because of eye and medical problems. Subsequently, the grievant experienced further medical problems and was eventually classified as a handicapped employee under the Rehabilitation Act of 1973, 29 U.S.C. section 701 et seq.

The arbitrator found, among other things, that the activity failed to reasonably accommodate the grievant's handicapped condition as required under the Rehabilitation Act of 1973 and the regulations contained in 29 C.F.R. section 1613.703-.704, which require, among other things, Federal agencies to give full consideration to the hiring, placement and advancement of qualified mentally and physically handicapped persons. The arbitrator also found that the agency did not show that making a reasonable accommodation for the grievants's condition would create undue hardship. Particularly, the arbitrator found that the activity failed to accommodate the grievant's eyesight problem and resultant inability to use a VDT for more than a short time. He concluded that the only possible remedy for the grievant's problem would be the immediate restructuring of a suitable position in the activity and held that such a restructuring would not cause undue hardship in an organization the size of the activity. As his award, he ordered the activity to offer the grievant within 30 days a restructured clerical position without use of any VDT equipment and with the position description therefore containing reasonable elements and standards.

In its exceptions, the agency alleged that the award was contrary to its rights to assign work and assign employees under section 7106(a)(2)(A) and (B). Also the agency contended that the award was contrary to the Rehabilitation Act of 1973 and implementing regulations which only require that a handicapped employee be accommodated to the extent such accommodation does not create an undue hardship for the agency and does not require reassignment to another position.

In this case the Authority considered for the first time the extent management's right's to assign work and employees under section 7106(a)(2)(A) and (B) is affected by the requirements of the Rehabilitation Act of 1973 and its implementing regulations. Under the Act and its implementing regulations handicapped employees are entitle to reasonable accommodation unless the agency can demonstrate that the "accommodation would impose an undue hardship on the operation" of its program [29 C.F.R. section 1613.704(c)]. The Authority reviewed several relevant decisions of Federal courts and of the Special Panel that resolves disputes between MSPB and the EEOC.

The Authority held the arbitrator's award reflects a proper interpretation of the provisions of the Rehabilitation Act of 1973 and 29 C.F.R. section 1613.704 consistent with the interpretations made by the Special Panel and the courts. The agency did not demonstrate to the arbitrator and did not demonstrate in its arguments before the Authority that the assignment of the grievant to a restructured position which does not require the use of a VDT terminal could cause it undue hardship. Neither did the agency show that the operation of a VDT is such an essential function of the grievant's clerical position that it could not be eliminated and replaced by other appropriate duties within the position. The award simply required restructuring of the grievant's present position, not reassignment, and is consistent with law.

Federal Labor Relations Authority

24 FLRA No. 20

Arlington National Cemetery, ANCIV-MMC and NAGE, Local R4-93, Case No. 3-CU-60007 (Decided November 21, 1986)

SUBJECT MATTER INDEX ENTRIES

STATUTE

REPRESENTATION PROCEDURE
  NO BASIS FOR GRANTING REVIEW
    MERE DISAGREEMENT WITH THE REGIONAL DIRECTOR'S FINDINGS

DIGEST NOTES

Mere disagreement with the Regional Director's determinations in a representational matter which are based on precedent is not a basis for granting review under section 2422.17 of the Authority's rules and regulations. The application for review of a Regional Director's decision and order on a petition for clarification of unit did not present compelling reasons for granting review.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

24 FLRA No. 21

NAGE and VA Medical Center, Grand Junction, Colo., Case No. 0-NG-1211 (Decided November 21, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
ASSIGN WORK, RESERVED MANAGEMENT RIGHT	7105(a)(2)(E)
HOURS OF WORK	7106(a)(2)(B)
CODE OF FEDERAL REGULATIONS	
5 C.F.R. 610.121	
COLLECTIVE BARGAINING AGREEMENT	
REOPENER CLAUSE FOR MID-TERM BARGAINING	
COLLECTIVE BARGAINING PROCESS AND THE DUTY TO BARGAIN	
MID-TERM BARGAINING	
BARGAINING OBLIGATION TO NEGOTIATE A REOPENER CLAUSE	
HOURS OF WORK	
DAYS OFF	
CONSECUTIVE DAYS OFF REQUIREMENT	
SHIFT ASSIGNMENTS	
FREQUENCY OF CHANGES IN SHIFT ASSIGNMENTS	
INTERVAL BETWEEN SHIFTS	
STARTING AND QUITTING TIMES FOR UNION OFFICIALS	
UNITED STATES CODE	
5 U.S.C. 5543	

DIGEST NOTES

A proposal is negotiable that would provide a reopener clause in the parties agreement allowing the union to initiate bargaining proposals during the term of the agreement. While an agency has no duty to bargain over mid-term proposals initiated by a union, there is nothing that would prohibit an agency from agreeing to a reopener clause which would require it to do so. (proposal 1)

A proposal is negotiable that would adjust the starting and quitting times of union officials when those officials are processing grievances involving employees on shifts other than their own. The proposal would facilitate the carrying out of representational activities as an adjunct to whatever separate agreements directly concerned with use of official time that the parties are able to reach in particular circumstances. The agency may take into account its work assignment requirements in arriving at those separate agreements and in acting on individual requests pursuant to those agreements. Thus the proposal does not interfere with management's right to assign work under section 7106(a)(2)(B) nor is the proposal inconsistent with 5 U.S.C. section 5543 or 5 C.F.R. section 610.121. (proposal 2)

A proposal is outside the duty to bargain that would prohibit the agency from scheduling an employee to work on a shift where the employee had worked on one of the two preceding shifts, or to work two tours of duty in the same week. The proposal is inconsistent with 5 C.F.R. section 610.121, a Government-wide regulation, which requires it to schedule employees consistent with actual work requirements. (proposal 3)

A proposal is negotiable which requires that employees' days off will be consecutive except when patient care is adversely affected. The proposal is not inconsistent with 5 C.F.R. section 610.121, a Government-wide regulation which requires the scheduling of employees consistent with actual work requirements. (proposal 5)

Federal Labor Relations Authority

24 FLRA No. 22

Defense Mapping Agency, Washington, D.C. and Defense Mapping Agency Aerospace Center, St. Louis, Missouri and NFFE, Local 1827, Case No. 7-CA-50623 (Decided November 21, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
AGENCY ULP (ALLEGED) 7116(a)(5) INFORMATION	7114(b)(4)(B) and (C) 7116(a)(1), (5) and (8)
AGENCY ULP (ALLEGED) 7116(a)(8) 7114(b)(4)	7118

INFORMATION, UNION RIGHTS
  CONFIDENTIAL INFORMATION
    SANITIZED COPIES OF INFORMATION
  NECESSITY OR RELEVANCE FOR FULL AND PROPER DISCUSSION
    PRESUMPTIVE RELEVANCE THEORY REJECTED
    SURVEY OF PERSONNEL PRACTICES, POLICIES, WORKING CONDITIONS
  TYPES OF INFORMATION SOUGHT
    INSPECTOR GENERAL REPORT
UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
  INFORMATION TO BE PROVIDED UNION

DIGEST NOTES

An inspector general report was necessary and relevant for full and proper discussion, understanding and negotiations of collective bargaining subjects within the meaning of section 7114(b)(4)(B), the Judge found. The report contained a survey and analysis of personnel practices, policies and working conditions which the union wanted to review in order to police the contract and assess its impact on possible grievances. The union did not seek confidential or internal management information; rather the union expressed a willingness to accept the report in sanitized form. The report did not constitute guidance, advice, counsel or training for management representatives under section 7114(b)(4)(C). In adopting the Judges decision, the Authority noted that the Judge did not apply a "presumptive relevance" standard. Rather, he found that the information was necessary in the circumstances of the case. Consequently, the activity violated section 7116(a)(1), (5) and (8) when it refused to provide the union with the requested data.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

PINE BLUFF ARSENAL
PINE BLUFF, ARKANSAS

Activity

and

Case No. 0-AR-1231

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 953

Union

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator A. Dale Allen, Jr. filed by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reason stated below, it has been determined that the exceptions must be dismissed as untimely filed.

The Arbitrator's award and a statement of fees and expenses are dated August 12, 1986, and, in the absence of evidence to the contrary, appear to have been served on the parties by mail on the same day.

Under section 7122(b) of the Statute, as amended,[1] and section 2425.1 of the Authority's Rules and Regulations, as amended,[2] which amendments are applicable to exceptions pending or filed with the Authority on or after March 2, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to computation of the time limit here involved, any exceptions to the Arbitrator's award in this case had to be filed, that is, received in the national office of the Authority not later than the close of business on September 15, 1986.

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[1] Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

[2] 49 Fed. Reg. 22623 (1984).

However, the exceptions were not filed with the Authority at its national office in Washington, D.C., until September 18, 1986. In this regard, the record establishes that the Union addressed the exceptions to the Authority's Dallas Regional Office, and mailed them by regular mail from Pine Bluff, Arkansas on September 11, 1986. The Dallas Regional Office received the exceptions on September 15, 1986. and exercised due diligence in forwarding them on September 16, 1986. The exceptions were not received by the Authority's national office until September 18, 1986,3/ and, therefore, were untimely filed.

Accordingly, as the Union's exceptions were untimely filed, they are hereby dismissed.

For the Authority.

Issued, Washington, D.C., November 20, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

3/ It is well established that exceptions to an Arbitrator's award cannot be filed at a Regional Office, but must be filed with the Authority at its national office in Washington, D.C. *See*, *The Panama Canal Commission and Maritime Metal Trades Council, AFL-CIO*, 21 FLRA No. 38, n. 5 (1986).

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

LOCAL 1749, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES

Union

and

Case No. 0-AR-1209

COMMANDER, 47FTW, LAUGHLIN
AIR FORCE BASE, TEXAS

Agency

DECISION

I. Statement of the Case

This case is before the Authority on an exception to the award of Arbitrator Charles W. Tyer filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. Background and Arbitrator's Award

The issue submitted to arbitration was whether the 14-day suspension of the grievant, a government procurement agent, for alleged deliberate misrepresentation and concealment of a material fact in the purchase of certain merchandise, was for just cause under the terms of the parties' collective bargaining agreement and applicable regulations. The Arbitrator found that the suspension was not for just cause and ordered that the grievant be made whole for all backpay and other benefits lost due to the adverse action. The Arbitrator further ordered that the grievant be reimbursed for all attorney fees and other expenses related to this case which are appropriate under prevailing Federal regulations.

III. Agency Exception

In its exception, the Agency contends that the Arbitrator's award of attorney fees is contrary to 5 U.S.C. § 7701(g)(1). In support of its exception, the Agency argues that the Arbitrator failed to supply a fully articulated decision to support the award of attorney fees and that the award "rests upon a cursory statement by the [A]rbitrator" and is without the "required demonstrable pragmatic analysis of the facts set out in applicable statutes."

IV. Union Opposition

The Union asserts in its opposition to the Agency's exception that the Arbitrator's written response to the Union's Request for Supplemental Decision, in which the Arbitrator made additional and specific determinations relating to his award, satisfies the requirements for sustaining the Arbitrator's award of attorney fees. Alternatively, the Union requests that the Authority remand the case to the Arbitrator if the Authority finds that the award does not meet the requirements of 5 U.S.C. § 7701(g).

V. Analysis and Conclusion

As we discussed in Naval Air Development Center, Department of the Navy and American Federation of Government Employees, Local 1928, AFL-CIO, 21 FLRA No. 25 (1986), a threshold requirement for entitlement to attorney fees under the Back Pay Act, 5 U.S.C. § 5596, is a finding that the grievant had been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. Further, an award of attorney fees must be in conjunction with an award of backpay to the grievant on correction of the unwarranted or unjustified personnel action. The award of attorney fees must be reasonable and related to the personnel action, and in accordance with the standards established under 5 U.S.C. § 7701(g).

Section 7701(g) prescribes that for an employee to be eligible for an award of attorney fees, the employee must be the prevailing party. Section 7701(g)(1), applicable to all cases except those of discrimination, requires that an award of attorney fees must be warranted "in the interest of justice," that the amount must be reasonable, and that the fees must have been incurred by the employee. The standards established under section 7701(g) further require a fully articulated, reasoned decision setting forth the specific findings supporting the determination on each pertinent statutory requirement, including the basis upon which the reasonableness of the amount was determined when fees are awarded. An arbitrator's cursory statement that the arbitrator considered the necessary elements of analysis does not meet the requirement under 5 U.S.C. § 7701(g) for a fully articulated, reasoned decision. An arbitrator's award of attorney fees must draw its essence from a demonstrable, pragmatic analysis of the factors set out in the applicable statutes. Naval Air Development Center, slip op. at 10-11.

In this case, the Arbitrator's statement concerning the award of attorney fees does not meet the requirements just discussed. In National Association of Air Traffic Specialists and Federal Aviation Administration, Washington Flight Service Station, 21 FLRA No. 26 (1986), the Authority explicitly stated that in future cases, "if the Authority finds that an award granting attorney fees is deficient because it is not fully supported as required, the Authority will set aside or modify the award as appropriate," rather than remand the award to the parties for clarification and interpretation. Slip op. at 5. In this case, as evidenced in management's brief before the Arbitrator, the Agency specifically informed the Arbitrator that "should the [a]rbitrator consider such [attorney] fees appropriate, the award must comply with the requirements of 5 U.S.C. § 7701(g) and the Federal Labor Relations Authority as established in 21 FLRA No. 25." (Management's Brief Before the Arbitrator, at 5, attached to Petition for Exception.) The Arbitrator, therefore, was aware of his obligation to ensure that the award of attorney fees was consistent with applicable requirements. The failure of the parties to provide the Arbitrator with a copy of the Authority's applicable rulings does not, as the Union asserts, cure the deficiency, nor does it warrant a remand of the case for clarification. Similarly, the Arbitrator's denial of the Union's request for a Supplemental Decision, where he states that he "has no further authority in this matter[,]" does not satisfy the requirements for sustaining the Arbitrator's award of attorney fees.

The Arbitrator's award of attorney fees is deficient since it was not made in accordance with the required standards.

VI. Decision

For the above reasons, the Arbitrator's award is modified by setting aside the award of attorney fees.*/

Issued, Washington, D.C., November 21, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In view of the Authority's decision, the Agency's request for a stay is denied as moot.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF
AGRICULTURE EMPLOYEES

Union

and Case No. 0-NG-1280

U.S. DEPARTMENT OF AGRICULTURE,
ANIMAL AND PLANT HEALTH INSPECTION
SERVICE, PLANT PROTECTION AND
QUARANTINE PROGRAM

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and concerns the negotiability of the following provision of a locally negotiated supplemental agreement disapproved by the Agency head as provided in section 7114(c)(4) of the Statute:

> Travel and per diem for negotiations and other activities directly related to negotiations shall be negotiated.

We find the provision to be negotiable.[1]

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[1] With respect to the Union's Motion for Waiver of Time Limits, the time limit for filing a petition for review of an agency's allegation of nonnegotiability is specified in section 7117(c)(4) of the Statute. It may not be waived or extended. There is no basis, however, for a determination that the allegation in this case was served on a date which would render the Union's petition untimely. It is, therefore, unnecessary to rule on the Motion.

II. Positions of the Parties

The Agency contends that payment of travel and per diem expenses is specifically provided for by law and the provision is therefore nonnegotiable because it does not concern a condition of employment of bargaining unit employees within the meaning of section 7103(a)(14)(C) of the Statute. The Agency also argues that the decision of the Supreme Court in Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1983) (BATF) requires a conclusion that travel and per diem payments for employees engaged in union representational activities is not within the duty to bargain. The Agency contends, therefore, that the Authority's decisions in National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 21 FLRA No. 2 (1986), petition for review filed sub nom. Department of the Treasury, U.S. Customs Service v. FLRA, No. 86-1198 (D.C. Cir. March 27, 1986) and American Federation of Government Employees, AFL-CIO, National Council of Federal Grain Inspection Locals and U.S. Department of Agriculture, Federal Grain Inspection Service, 21 FLRA No. 21 (1986), petition for review filed sub nom. U.S. Department of Agriculture, Federal Grain Inspection Service v. FLRA, No. 86-1295 (D.C. Cir. May 21, 1986), are incorrect. The Agency maintains that for authorization of payment for travel and per diem expenses to be consistent with law and regulation it "can only be made as a unilateral decision of management, based on a case-by-case review of the circumstances of each proposed travel situation," and not through negotiation. Agency Statement of Position at 6. Finally, the Agency argues that the provision is inconsistent with section 7101(b) of the Statute because whatever action it takes would involve it in "lengthy and costly litigation," which is contrary to the accomplishment of an effective and efficient government. Agency Statement of Position at 8.

The Union states that the provision does not require payment of travel and per diem expenses but only a commitment by the Agency to negotiate about such payment when the issue arises. The provision is negotiable under the Authority's decisions in Customs Service and Federal Grain Inspection Service, the Union argues, because in those decisions the Authority rejected each of the arguments made by the Agency in this case. The Union contends that the Agency's one new argument, that the provision would result in costly litigation contrary to section 7101(b) is a "patent fallacy" because it would mean that any negotiability dispute would be contrary to the Statute. Union Response to Agency Statement of Position at 5.

III. Analysis and Conclusion

A. The Provision Concerns a Condition of Employment

In Customs Service, the Authority rejected the same argument as that made here, namely, that a proposal relating to travel and per diem for employee union representatives did not concern conditions of employment of bargaining unit employees. For the reasons expressed in that decision, the Authority finds that the provision concerns a condition of employment of bargaining unit employees.

B. The Provision Is Not Inconsistent With Federal Law and Government-wide Rules and Regulations

In BATF the Supreme Court held that payment of travel and per diem expenses for employees engaged in union representational activities was not required by the Statute. The Supreme Court did not hold that agencies and unions were precluded by law from negotiating over the payment of such expenses, only that payment was not required by law.

In Customs Service we rejected the same argument which the Agency makes here, namely, that payment of travel and per diem expenses for union representatives is inconsistent with law and regulation and therefore nonnegotiable. We found that under the Travel Expense Act, 5 U.S.C. §§ 5701 et seq., and the Federal Travel Regulations (FTRs), 41 CFR, Part 101-7, as interpreted by the Comptroller General, 46 Comp. Gen. 21 (1966), agencies have discretion to make determinations that travel in the context of union activity is sufficiently within the interest of the Government to constitute official business. Following this determination, otherwise proper travel and per diem expenses may be paid from agency funds. Contrary to the Agency's argument, nothing in these authorities requires that this necessary determination be made only by management and only on a case-by-case basis. The Agency does not argue that travel connected with negotiations or activities related to negotiations could not meet this required standard.2/

Moreover, the Authority has consistently held that in the absence of a demonstration to the contrary, proposals

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2/ As the Union points out, in agreeing to this provision the parties have agreed to bargain on this determination. Union Response to Agency Statement of Position at 4.

providing for the payment of travel and per diem expenses for union representatives would not prevent management from making individual case-by-case determinations as to the propriety under the FTRs of authorizing particular payments. National Labor Relations Board Union and National Labor Relations Board, 22 FLRA No. 55 (1986), petition for review filed sub nom. National Labor Relations Board v. FLRA, No. 86-1504 (D.C. Cir. Sept. 8, 1986). Compare National Association of Agricultural Employees and U.S. Department of Agriculture, Animal and Plant Health Inspection Service, 22 FLRA No. 45 (1986) (Union Proposal 2) (Authority unable to conclude based on the record in the case that the provision would allow for compliance with law and regulation.) There is nothing in the provision in this case which prevents the Agency from complying with the requirements of law and regulation. In fact, since this provision provides for bargaining on such matters "as the issue arises," it clearly is not inconsistent with any requirement under law and regulation for case-by-case determinations. Compare National Association of Agricultural Employees and U.S. Department of Agriculture, Animal and Plant Health Inspection Service, 22 FLRA No. 45 (1986) (Union Proposal 1 was a "general request to bargain" and it was not sufficiently specific and delineated to meet the conditions for review set forth in the Authority's Regulations). Finally, as to the Agency's section 7101(b) argument, in our opinion the possibilities alluded to by the Agency constitute no basis for reversing the conclusion reached in Customs Service.

Based on the foregoing analysis, the Authority finds that the provision concerns a condition of employment and is not inconsistent with law or Government-wide regulation. Therefore, the provision is within the duty to bargain.[3]

IV. Order

Pursuant to section 2424.10 of the Authority's Rules and Regulations, the Agency must rescind its disapproval of the disputed provision, which was bargained on and agreed to by the local parties.

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[3] In finding that the provision is within the duty to bargain, we express no judgment as to its merits.

Issued, Washington, D.C. November 21, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

24 FLRA No. 17

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R14-8

Union

and

Case No. 0-NG-1218

VETERANS ADMINISTRATION MEDICAL
CENTER, TOPEKA, KANSAS

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed by the Union under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents issues concerning the negotiability of five Union proposals.[1]

II. Union Proposal 1

ARTICLE 10

> Section 4. A steward or employee may request permission from his/her supervisor to report on duty one hour early or late, and be relieved from duty one hour early or late, whichever may be required to permit the steward to assist an employee, who is working a different shift, in the processing of a grievance during both the steward's and employee's on-duty time. Determination to grant the request will be based on staffing

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[1] The Union withdrew its appeal as to one additional proposal concerning Agency searches of desks and lockers. Consequently, this proposal will not be considered further here.

workload requirements as well as whether the change would result in the tour of duty extending over two days.

A. Positions of the Parties

The Agency contends that the proposal would interfere with its right under section 7106(a)(2)(B) to assign work by prohibiting it from assigning duties to a Union officer or steward during the first or last hour of a shift so that the employee could process grievances. The Agency also argues that Proposal 1 would have the effect of granting compensatory time to an employee in circumstances not authorized under 5 U.S.C. § 5543. The Agency further contends that the proposal is inconsistent with 5 C.F.R. § 610.121, a Government-wide regulation. It claims that the proposed adjustment would require the Agency to schedule employees on the basis of union representational activities rather than the Agency's mission as required by the regulation.

The Union contends that its proposal would only require the Agency to consider the request of a Union officer or steward for official time. It claims that the proposal would enhance an employee's ability to have the Union representative of his or her choice. The Union also argues that the proposal would not require the Agency to adjust schedules but instead would allow the Union representative and the employee to use the official time to which they are otherwise entitled at a time which would be convenient. Finally, the Union contends that Proposal 1 would not require the grant of compensatory time since it would not affect the number of hours worked by an employee during the week.

B. Analysis and Conclusions

As the Authority has previously indicated, parties may negotiate procedures and practices which do not negate an agency's rights but which would enable a union to implement its statutory rights and duties with respect to the representation of employees. See American Federation of Government Employees, AFL-CIO, Local 2272 and Department of Justice, U.S. Marshals Service, District of Columbia, 9 FLRA 1004, 1014-15 (1982) (Union Proposal 7). In National Treasury Employees Union, Chapter 66 and Internal Revenue Service, Kansas City Service Center, 1 FLRA 926 (1979), the Authority found that a proposal that would adjust the starting and quitting times of employees did not violate the agency's rights under section 7106(b)(1) and was within the duty to bargain. Union Proposal 1 is similarly concerned with adjusting the starting and quitting times of Union officials when those officials are processing grievances involving an employee on a shift other than their own. Contrary to the Agency's contentions, the proposal does not prohibit it from assigning duties to the Union officials covered by the proposal. Rather, Proposal 1 merely concerns the time when those officials will perform either duties which the Agency has already assigned to them or representational functions on official time as negotiated pursuant to section 7131(d) of the Statute. See American Federation of Government Employees, AFL-CIO, National Joint Council of Food Inspection Locals and Department of Agriculture, Food Safety and Quality Service, Washington, D.C., 9 FLRA 663, 665 (1982) (Union Proposal 1). Moreover, by its terms, the Union's proposal does not require the request to be granted and specifically provides for consideration of the Agency's staffing workload requirements. Consequently, we find that Union Proposal 1 constitutes a procedure within the meaning of section 7106(b)(2) which does not violate management's right to assign work.

We find no basis upon which to conclude that the Union's proposal constitutes a grant of compensatory time. Additionally, the Agency has not demonstrated that Union Proposal 1 would require it to schedule employees in a manner other than that required by 5 C.F.R. § 610.121. Compare National Association of Government Employees, Local R7-23 and Department of the Air Force, Scott Air Force Base, Illinois, 23 FLRA No. 97 (1986), in which the Authority found that Union Proposal 1 requiring 14 days advance notice of a scheduling change was outside the duty to bargain in that the proposal made no allowance for exceptions to the 14-day requirement as provided under 5 C.F.R. § 610.121 and 5 U.S.C. § 6101. Accordingly, Union Proposal 1 is within the duty to bargain.

III. Union Proposal 2

ARTICLE 11

> Section 2. When an employee changes work shifts, he/she will not be required to report for duty for eleven (11) hours.
>
> Section 9. Employees will not be required to work more than two tours of duty in one workweek except to allow for a minimum of eleven (11) hours between the end of one tour and the beginning of the next.

A. Positions of the Parties

The Agency contends that Union Proposal 2 is inconsistent with 5 C.F.R. § 610.121, a Government-wide regulation which requires it to schedule employees consistent with actual work requirements. The Agency argues that the proposal would require it to provide employees with eleven hours between each shift worked by an employee regardless of actual work requirements.

The Union contends that the proposal does not conflict with the regulation cited by the Agency. It claims that Proposal 2 does not prevent the Agency from acting at all to schedule employees in accordance with mission requirements.

B. Analysis and Conclusion

The Authority finds that Union Proposal 2 is outside the duty to bargain for a reason other than that raised by the Agency. Union Proposal 2 would prohibit the Agency from scheduling an employee to work on a shift if that employee had worked during the previous eleven hours, or to schedule an employee for two different tours of duty in the same week except to provide the employee with an eleven hour interval between shifts, regardless of the Agency's work requirements and whether that employee's particular skills were needed on a particular shift. Such requirements would place a condition upon the Agency's exercise of its right to assign work and could prevent the Agency from determining what duties were to be performed on what shift in violation of section 7106(a)(2)(B). See National Labor Relations Board Union, Local 19 and National Labor Relations Board, Region 19, 2 FLRA 774 (1980). By contrast, Union Proposal 1 would not affect the Agency's discretion to determine what work was to be performed on what shift, and enables the Agency to consider its staffing workload requirements when acting on requests for adjustments in starting and quitting times. Accordingly, we conclude that Union Proposal 2 is outside the duty to bargain. In view of this determination, we need not determine whether the proposal is also inconsistent with 5 C.F.R. § 610.121.

IV. Union Proposal 3

ARTICLE 11

> Section 6. Ordinarily, employees' days off will be consecutive. Employees' days off will not be arbitrarily split. An employee's written request for alternative scheduling including split days off will be considered.

A. Positions of the Parties

The Agency contends that Union Proposal 3 is inconsistent with 5 C.F.R. § 610.121, a Government-wide regulation which requires it to schedule employees consistent with actual work requirements. It argues that Union Proposal 3 would require it to schedule employees for consecutive days off regardless of the Agency's actual work requirements. The Union disputes the Agency's contentions.

B. Analysis and Conclusion

The Authority finds that Union Proposal 3 is to the same effect as the proposal which we found to be within the duty to bargain in American Federation of State, County and Municipal Employees, Local 2477 and Library of Congress, 14 FLRA 59 (1984). In that case we held that a proposal to rotate days off for certain agency employees was not contrary to any of the management rights raised by the agency. Similarly, the Agency does not contend, and it is not otherwise apparent, that Union Proposal 3 here is inconsistent with any management rights.

Additionally, we reject the Agency's contention that the proposal would prevent it from scheduling employees consistent with actual work requirements. The proposal provides that employees will "ordinarily" be given consecutive days off. The Union states that the Agency need not provide employees with consecutive days off where patient care would be adversely affected. Union Petition for Review at 2. We accept the Union's interpretation and find that, while it would require the Agency to attempt to provide consecutive days off in most cases, the proposal would not require consecutive days off where the Agency determines that patient care would be adversely affected. Accordingly, we conclude that Union Proposal 3 is not inconsistent with 5 C.F.R. § 610.121 and is within the duty to bargain.

V. Union Proposal 4

ARTICLE 11

> Section 7. Since the eating of meals by GS employees between 6:00 p.m. and 6:00 a.m. will reduce the amount of night differential pay for the shift, these employees will not ordinarily be required to eat their meals within this time period.

A. Positions of the Parties

The Agency contends that Union Proposal 4 violates its right under section 7106(a)(2)(B) to assign work. The Union contends that the proposal is merely concerned with when employees will take the 30-minute meal period to which they are entitled.

B. Analysis and Conclusion

The Authority finds that Union Proposal 4, like Union Proposal 1 discussed above, does not prevent the Agency from assigning duties to the employees covered by the proposal. Proposal 4 does not concern whether employees are entitled to a meal period or how long that period should be. Rather, the proposal is concerned with when employees will take the 30-minute meal period to which they are entitled.

The Authority has held that the time at which meals or breaks will be observed is within the duty to bargain. See American Federation of Government Employees, Local 3342, AFL-CIO and Department of Health and Human Services, Social Security Administration, 19 FLRA No. 124, slip op. at 2-3 (1985) (breaks); Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 19 FLRA No. 123, slip op. at 4 (1985) (lunch periods). Additionally, the proposal provides that the employees "ordinarily" will not be required to eat their meals during the 6:00 p.m. to 6:00 a.m. period. The Union states that this will give the Agency flexibility to require the meal period to occur during the specified hours if necessary. Union Reply Brief at 8. The language of the proposal is not inconsistent with the Union's stated intent and we adopt the Union's interpretation. Accordingly, for the reasons set forth above, we find that Union Proposal 4 does not violate the Agency's rights and is within the duty to bargain.

VI. Union Proposal 5

ARTICLE 15

> Section 2. Employees will not be held responsible for conditions in their immediate work area beyond what can be reasonably expected based on job training or duties beyond the scope of their position description; however, employees have the obligation to report obvious hazards or unlawful activities of which they become aware.

A. Positions of the Parties

The Agency contends that Union Proposal 5 violates its right under section 7106(a)(2)(B) to assign work by preventing it from requiring an employee to perform duties for which the employee has not been given job training or which are outside the employee's position description.

The Union contends that the proposal would not prevent the Agency from assigning duties to employees. Rather, the Union states that its proposal merely provides that an employee will not be held responsible or be subject to a performance-based action because of duties for which the employee has not been trained or which are outside the employee's position description. The Union suggests the proposal merely incorporates into the parties' agreement circumstances in which an arbitrator would not uphold a performance-based action against an employee.

B. Analysis and Conclusions

The Authority finds, contrary to the Agency's interpretation, that Proposal 5 would not prevent the Agency from assigning duties to employees. Rather, as contended by the Union, the proposal would prohibit the Agency from using assigned duties as the basis for a performance evaluation or a performance-based action where (1) an employee has not been trained to perform the assigned duties; or (2) the assigned duties are beyond the scope of the duties in the employee's position description.

The Authority has found that a proposal prohibiting an agency from evaluating employees' performance of duties not within their job descriptions is within the duty to bargain. American Federation of Government Employees, Council of Social Security District Office Locals and Department of Health and Human Services, Social Security Administration, 11 FLRA 608, 611-12 (1983) (Union Proposal 2). The Authority held that such a proposal would not prevent the agency from evaluating employees on any particular duties since the agency could always add the functions upon which it wished to evaluate employees to the employees' position description.

The Authority has also held, however, that a proposal prohibiting an agency from evaluating employees upon certain functions unless the agency first provides training violates management's rights. American Federation of Government Employees, AFL-CIO, Local 3004 and Department of the Air Force, Otis Air Force Base, Massachusetts, 9 FLRA 723 (1982).

The Authority found that the proposal in Otis Air Force Base would condition the agency's exercise of one of its reserved rights upon the prior exercise of another of its rights. That is, the proposal conditioned the agency's determination of the duties and functions upon which employees' performance would be appraised, an exercise of its right to direct employees and assign work under section 7106(a)(2)(A) and (B), upon its prior decision as to what training should be assigned, an exercise of its right to assign work under section 7106(a)(2)(B). Similarly, the portion of Union Proposal 5 here that prevents the Agency from holding an employee responsible for those duties for which it has not provided training would prohibit the Agency from exercising its rights to direct employees and assign work by evaluating employees unless it had first exercised its right to provide training to those employees. Accordingly, to the extent that Union Proposal 5 prevents the Agency from holding employees responsible for duties for which it has not provided training, it is outside the duty to bargain.

VII. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request, or as otherwise agreed to by the parties, bargain concerning Union Proposals 1, 3, and 4.[2/] IT IS FURTHER ORDERED that the Union's petition for review as to Union Proposals 2 and 5 be, and it hereby is, dismissed.

Issued, Washington, D.C., November 21, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

[2/] In finding these proposals to be within the duty to bargain the Authority makes no judgment as to their merits.

24 FLRA No. 18

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

LOCAL 12, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Union

and　　　　Case No. 0-AR-1081

U. S. DEPARTMENT OF LABOR

Agency

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Benjamin B. Lipton filed by the Agency and by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievant was employed by the Agency as a GS-5 library technician from 1980 until he voluntarily resigned in 1985. In a grievance filed in January 1984, he contended that he was denied a career ladder promotion to GS-6 because of sex, race and union activities and that he was harassed. The grievance was submitted to arbitration. The Arbitrator found that the allegations of discrimination and harassment were not supported by the evidence, and ruled that the grievant's level of performance did not qualify him for a promotion to GS-6. Although the Arbitrator found that the Agency failed to meet its obligation under the agreement to provide the grievant with grade-building experience and developmental opportunity, he also noted that the evidence did not establish a reasonable probability that the grievant would have been promoted even if that experience had been provided. As his award the Arbitrator ordered the Agency to offer the grievant "instatement" in a GS-5 career ladder position with the potential for promotion to GS-6 at two six-month intervals during the first year with retroactive pay if the grievant were promoted. He denied the grievant's request for attorney fees.

III. AGENCY EXCEPTIONS

A. Contentions

The Agency contends the award conflicts with its right to select under section 7106(a)(2)(C) of the Statute because it requires the Agency to offer the grievant the GS-5 position from which he voluntarily resigned. The Agency also contends that the award is contrary to the Back Pay Act, 5 U.S.C. § 5596, because it awards backpay without the requisite finding that "but for" the Agency's action the grievant would have been promoted.

B. Analysis and Conclusion

The Authority agrees that the award is deficient on the grounds stated in Agency's exceptions. It is well established that management's right to make a selection for an appointment can be abridged only if the arbitrator finds a direct connection between improper agency action and the failure of a specific employee to be selected. U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution, Lexington, Kentucky and American Federation of Government Employees, Local 817, 21 FLRA No. 108 (1986). In this case, the Arbitrator did not find that the Agency's failure to provide the grievant with grade-building experience directly resulted in the denial of the career ladder promotion. To the contrary, he ruled that the grievant's performance was such that there was no reasonable probability of his being promoted even if grade-building experience had been provided. Further, the Arbitrator made no finding that the Agency's improper action caused the grievant to resign from his GS-5 position. Therefore, we conclude that the award directing "instatement" of the grievant in a GS-5 position is deficient as contrary to management's right to make selections for appointment under section 7106(a)(2)(C) of the Statute.

With regard to the Arbitrator's award of retroactive pay, we conclude that the award is contrary to the Back Pay Act. Backpay can be granted under that Act only upon finding that (1) an agency personnel action was unjustified or unwarranted; (2) the personnel action directly resulted in the withdrawal or reduction of an aggrieved employee's pay, allowances, or differentials; and (3) but for such action, the grievant would not have suffered such withdrawal or reduction. U.S. Department of Commerce, Patent and Trademark Office and the Patent Office Professional Association, 21 FLRA No. 52 (1986). The Arbitrator made no finding that an improper action by the Agency directly resulted in the denial of grievant's promotion or in his resignation from his GS-5 position. Therefore, the requirements of the Back Pay Act have not been met.

IV. FIRST UNION EXCEPTION

A. Contentions

The Union contends that the Arbitrator's denial of its request for attorney fees is contrary to law. The Union maintains that it is entitled to attorney fees because it was the prevailing party in the arbitration proceeding, and also maintains that the Arbitrator's summary denial of fees without expressing a basis for his decision was arbitrary and capricious.

B. Analysis and Conclusion

The Union's first exception is denied. The Authority has consistently held that an arbitrator is authorized to award attorney fees under the terms of the Back Pay Act only in conjunction with an award of backpay on the correction of an unjustified or unwarranted personnel action. United States Army Aviation Systems Command and National Federation of Federal Employees, Local 405, 22 FLRA No. 35 (1986). Further, the award of attorney fees must be in accordance with the standards established under 5 U.S.C. § 7701(g). Id. In this case, as noted in connection with the Agency's exceptions, the Arbitrator's award fails to meet the requirements of the Back Pay Act and accordingly, there is no basis for an award of backpay or attorney fees under the Act.

V. SECOND UNION EXCEPTION

A. Contentions

In its second exception the Union contends that the award is deficient because the Arbitrator denied it a fair hearing by improperly rejecting evidence and by misunderstanding key factual matters.

B. Analysis and Conclusion

The Union's second exception fails to provide a basis for finding the award deficient and is denied. Although the Authority will find an arbitration award deficient if it is established that the arbitrator failed to conduct a fair hearing by refusing to hear pertinent and material evidence, an arbitrator has considerable latitude in the conduct of the hearing. U.S. Department of Labor and American Federation of Government Employees, Local No. 644, NCFLL, 12 FLRA 639, 641 (1983). In this case the Union has failed to establish that it was denied a fair hearing. We conclude that the Union's second exception constitutes nothing more than disagreement with the Arbitrator's reasoning and conclusions and with his evaluation of the evidence and testimony presented. This disagreement is not a basis for finding an award deficient. Supervisor of Shipbuilding, Conversion and Repair, United States Navy and Local R4-2, National Association of Government Employees (NAGE), 5 FLRA 235 (1981).

VI. DECISION

While the Agency's exceptions provide a basis for finding the award deficient as contrary to section 7106(a)(2)(C) of the Statute and the Back Pay Act, we recognize that the Arbitrator made a valid finding that the Agency violated the agreement when it failed to provide the grievant with grade-building experience. In Bureau of Prisons, 21 FLRA No. 108, supra, the Authority held that priority consideration under FPM Chapter 335 is available as a corrective action in a variety of situations in which employees have been found to be wrongfully denied the consideration or process to which they are entitled. Therefore, the Arbitrator's award is set aside and replaced with the following:

> Consistent with applicable law, the grievant shall be given priority consideration for selection to the next available GS-5 library technician position for which he applies.

Issued, Washington, D.C., November 21, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 12

Union

and Case No. 0-AR-1070

U.S. DEPARTMENT OF LABOR

Agency

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Robert Bennett Lubic filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievant was downgraded as the result of a reduction in force (RIF) from the position of secretary/typist, GS-6, in the Women's Bureau to a position of clerk/typist, GS-4, in the Benefits Review Board (BRB). She filed a grievance alleging that she was improperly placed in the BRB position and also that she was unable to work at a video display terminal (VDT) because of eye and medical problems. Subsequently, the grievant experienced further medical problems and was eventually classified as a handicapped employee under the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. During this time she was given other assignments including a reassignment to a GS-4 mail and file clerk position in another office. However, none of the assignments proved satisfactory and the grievant filed additional grievances which were eventually submitted to arbitration.

The Arbitrator stated that three issues were before him: (1) whether the Agency discriminated against the grievant on the basis of race; (2) whether the grievant suffered harmful error when the Agency failed to place her on a repromotion list; and (3) whether the Agency accommodated the grievant's handicapped condition. With respect to the first two issues, he found that the Agency did not discriminate against the grievant because of race and that the Agency did not harm the grievant when it failed to place her on a repromotion list at the time of the RIF. No exceptions were filed with regard to these findings. As to the third issue, the Arbitrator agreed with the Union that the Agency failed to accommodate the grievant's handicapped condition as required under the Rehabilitation Act of 1973 and the regulations contained in 29 C.F.R. § 1613.703, which require Federal agencies to give full consideration to the hiring, placement and advancement of qualified mentally and physically handicapped persons. Further, the Arbitrator found that (1) the Agency failed to make reasonable accommodation to the grievant's handicapped condition as required by 29 C.F.R. § 1613.704[1] and (2) the Agency did not show that making a reasonable accommodation for the grievant's condition would create undue hardship. Particularly, the Arbitrator found that the Agency failed to accommodate the grievant's eyesight problem and resultant inability to use a VDT for more than a short time. He concluded that the only possible remedy for the grievant's problem would be the immediate restructuring of a suitable GS-4 position in the BRB and held that such a restructuring would not cause undue hardship in an organization the size of the BRB, especially at the GS-4 level. As his award he ordered the Agency to offer the grievant within 30 days a restructured GS-4 clerical position at the BRB "without use of any VDT equipment and with the PD therefor containing reasonable elements and standards."

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[1] 29 C.F.R. § 1613.704 pertinently provides:

> (a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.
>
> (b) Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.
>
> (c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation.

III. AGENCY EXCEPTION

The Agency alleges that the Arbitrator's award is contrary to law because it requires the Agency to reassign the grievant to a specifically restructured position and violates management's right to assign work and to assign employees under section 7106(a)(2) of the Statute. The Agency contends that the award effectively requires management to establish a new clerical position which does not require use of a VDT and to place the grievant in the position. The Agency contends that the award is contrary to the Rehabilitation Act of 1973 and implementing regulations which only require that a handicapped employee be accommodated to the extent such accommodation does not create an undue hardship for the Agency and does not require reassignment to another position.

IV. ANALYSIS AND CONCLUSION

We conclude that the Agency's exception should be denied for the following reasons.

The Authority has consistently held that proposals and agreement provisions which interfere with management's right to assign employees and to assign work under section 7106(a)(2)(A) and (B) are outside the duty to bargain and not enforceable by arbitrators. National Treasury Employees Union, Chapter 26 and Internal Revenue Service, Atlanta District, 22 FLRA No. 30 (1986) (Proposal 5); Southwestern Power Administration and International Brotherhood of Electrical Workers, Local 1002, 22 FLRA No. 48 (1986). Proposals providing that work assignments will be altered or tailored to accommodate employees who are temporarily unable to perform their regularly assigned duties because of illness or injury have been held to be nonnegotiable. National Federation of Federal Employees, Local 1624 and Air Force

Contract Management Division, Hagerstown, Maryland, 3 FLRA 142 (1980); National Federation of Federal Employees, Local 943 and Department of the Air Force, Headquarters Keesler Technical Training Center, Keesler Air Force Base, Mississippi, 19 FLRA No. 113 (1985) (Proposal 2). However, the Authority has not had occasion to consider to what extent, if any, management's right to assign work and employees under section 7106(a)(2)(A) and (B) is affected by the requirements of the Rehabilitation Act of 1973 and its implementing regulations under which handicapped employees are entitled to reasonable accommodation unless the agency can demonstrate that the "accommodation would impose an undue hardship on the operation" of its program (29 C.F.R. § 1613.704(c)).

The rights to be accorded handicapped employees, including the effect of certain other Federal laws and the extent of any reasonable accommodation has been addressed in several cases. In the first case certified to the Special Panel under 5 U.S.C. § 7702,[2] the Panel resolved a conflict between the Equal Employment Opportunity Commission (EEOC) and the Merit Systems Protection Board (MSPB) over the interpretation of certain civil service directives. EEOC contended that those directives require that reassignment must be considered as a possible means of reasonable accommodation for handicapped employees. MSPB maintained that reassignment need not be considered as a means of reasonable accommodation since assignment constitutes an area of agency discretion under civil service law. The Panel concluded that the EEOC did not misapply the civil service directives and held there was nothing unreasonable in the EEOC's decision that reassignment is within the scope of reasonable accommodation under the the Rehabilitation Act. Ignacio v. U.S. Postal Service, Special Panel No. 1, February 27, 1986, 86 FMSR 7026.

In a later decision, the Special Panel stated that an "appellant may not force consideration of reassignment ad infinitum" where there are no vacant positions available. Lynch v. Department of Education, Special Panel, August 20, 1986, Docket No. DC07528210746; DC531D8211379. The Panel reiterated that its decision in Ignacio only requires that reassignment be considered as a reasonable accommodation and does not require an agency to create a position where none exists. Lynch, note 10.

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[2] The Special Panel was created by the Civil Service Reform Act of 1978 for the purpose of resolving disputes between the MSPB and the EEOC concerning cases with mixed civil service law and discrimination law issues that have been originally appealed to the MSPB. The Panel's jurisdiction in such matters is set out in 5 U.S.C. § 7702.

In a court case involving a discharged postal worker who claimed that he was not accorded reasonable accommodation for his handicapped condition, a district court held that the regulations implementing the Rehabilitation Act do not enumerate reassignment as a required accommodation and noted that there are no cases which hold that reassignment is required, including Ignacio. Carty v. Carlin, 623 F. Supp. 1181, 1185 (D.Md. 1985). The Court concluded that the duty to reasonably accommodate only contemplates accommodation of a qualified handicapped employee's present position and does not include a requirement to transfer or reassign an employee to another position.

With regard to an agency's duty under the Rehabilitation Act to accommodate a handicapped employee by restructuring the employee's position, the Sixth Circuit has held that the agency is not required to eliminate the essential functions of the employee's job or to restructure the job in a manner which would usurp the legitimate rights of other employees in a collective bargaining agreement. Jasany v. U. S. Postal Service, 755 F.2d 1244, 1250 (6th Cir. 1985). The Court held that the appellant was not a handicapped person within the meaning of the Rehabilitation Act and therefore failed to establish a prima facie case of handicap discrimination. However, the Court held that even if the employee were handicapped the Postal Service was not required to accommodate him by eliminating one of the essential functions of his job which was the operation of a certain mail sorting machine. The Court rejected the employee's contention that he could have been reassigned to the related job of "allied man" on the machine and noted that nothing in the record pertained to the existence of such a position and that the suggestion "confuses accommodation with elimination of an essential function." Jasany at 1251.

In the circumstances of this case, the grievant was certified as a qualified handicapped employee by the Agency. As such, she was entitled to "reasonable accommodation" which under 29 C.F.R. § 1613.704(b) includes "job restructuring" among other possibilities. The Arbitrator determined that the Agency failed to meet its obligation to provide reasonable accommodation to the grievant and found that the grievant could be assigned to a restructured GS-4 position not requiring use of a VDT without imposing undue hardship on the operation of the Agency.

The Authority finds that the Arbitrator's award reflects a proper interpretation of the provisions of the Rehabilitation Act of 1973 and 29 C.F.R. § 1613.704 consistent with the interpretations made by the Special Panel and the courts. The Agency did not demonstrate to the Arbitrator and has not demonstrated in its arguments before the Authority that the assignment of the grievant to a restructured GS-4 position which does not require the use of a VDT terminal would cause it undue hardship. Neither does the Agency show that the operation of a VDT is such an essential function of the grievant's clerical position that it could not be eliminated and replaced by other appropriate duties within the position. The award simply requires restructuring of the grievant's present position, not reassignment, and is consistent with law. Further, consistent with the case law discussed above, the Authority finds that nothing in the Statute or its legislative history reflects any intent to supersede the provisions of the Rehabilitation Act of 1973 and its implementing regulations pertinent here. Consequently, there is no basis for the Agency's exception that the Arbitrator's award is contrary to 5 U.S.C. § 7106(a)(2)(A) and (B) and to the Rehabilitation Act of 1973.

V. DECISION

Accordingly, for the above reasons, the Agency's exception is denied.

Issued, Washington, D.C., November 21, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ARLINGTON NATIONAL CEMETERY
ANCIV-MMC

Activity

and Case No. 3-CU-60007

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R4-93, SEIU, AFL-CIO

Labor Organization

ORDER DENYING APPLICATION FOR REVIEW

On September 30, 1986, Arlington National Cemetery, ANCIV-MMC (the Activity) filed a timely application for review, pursuant to section 2422.17(a) of the Authority's Rules and Regulations, seeking to set aside the Regional Director's Decision and Order on Petition for Clarification of Unit in the above-named case. In its application for review, the Activity contends that compelling reasons exist within the meaning of section 2422.17(c) of the Authority's Rules and Regulations for granting this application. The National Association of Government Employees, Local R4-93, SEIU, AFL-CIO (NAGE) filed an opposition to the Activity's application for review.

Upon consideration of the Activity's application for review, including all arguments in support thereof, the Authority concludes that no compelling reason exists for granting the application. Rather, the application in essence expresses mere disagreement with the Regional Director's findings which are based on precedent and have not been shown to be clearly erroneous or to have prejudicially affected the rights of any party.

Accordingly, pursuant to section 2422.17(f)(3) of the Authority's Rules and Regulations, the application for review of the Regional Director's Decision and Order on Petition for Clarification of Unit is denied.

Issued, Washington, D.C., November 21, 1986.

Calhoun

Jerry Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, SEIU, AFL-CIO

Union

and Case No. 0-NG-1211

VETERANS ADMINISTRATION MEDICAL
CENTER, GRAND JUNCTION, COLORADO

Agency

DECISION AND ORDERS ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed by the Union under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and presents issues concerning the negotiability of four Union proposals.

II. Union Proposal 1

> ARTICLE 8
>
> Section 1. Matters appropriate for mid-contract negotiations shall include those negotiable issues proposed by either party which are either newly formulated, or changes to established personnel policies and practices during the term of this agreement, which affect the working conditions of unit employees.
>
> Section 3(d). If the proposal is made by the Union, the time limits and procedures described in section 3(b) will be utilized, with the roles reversed.

A. Positions of the Parties

The Agency contends that Union Proposal 1 would require it to bargain over Union-initiated proposals during the term of the agreement. The Agency argues that it has no duty to bargain over such proposals absent management-initiated changes in conditions of employment, citing the Authority's decision in Internal Revenue Service, 17 FLRA 731 (1985), petition for review filed sub nom. National Treasury Employees Union v. FLRA, No. 85-1361 (D.C. Cir. June 14, 1985). The Agency also claims that the proposal conflicts with the parties' master agreement which limits mid-term bargaining to proposals concerning management-initiated changes.

The Union contends that the Internal Revenue Service case does not prohibit the parties from agreeing to bargain on Union-initiated mid-term proposals. The Union further argues that the section of the master agreement cited by the Agency does not apply to negotiations at the local level.

B. Analysis

1. Union-initiated mid-term proposals

In Internal Revenue Service, cited by the Agency, the Authority held that an agency has no general obligation to bargain over union-initiated proposals during the term of a collective bargaining agreement. However, the Authority also held that an agency may be obligated to bargain over such a union-initiated proposal where (1) management seeks to alter an established condition of employment in a manner which is not precluded by the agreement; (2) the proposal is submitted consistent with a reopener clause in the parties' agreement; or (3) the proposal is made under section 7106(b)(2) and (3) of the Statute in response to the exercise of a management right under section 7106(a). While an agency has no duty to bargain over mid-term proposals initiated by a union, there is nothing in the Internal Revenue Service case that would prohibit an agency from entering into a reopener clause like Union Proposal 1 which requires it to do so.

2. Interpretation of master agreement

The record in this case fails to provide a basis for substantiating the Agency's assertion that provisions of the parties' master agreement limit negotiations on this proposal. Further, to the extent that there are factual issues in dispute between the parties concerning the duty to bargain in the specific circumstances of this case, these issues may be raised in other appropriate proceedings. See American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 (1984).

C. Conclusion

For the reasons set forth above, Union Proposal 1 is within the duty to bargain.

III. Union Proposal 2

> ARTICLE 10
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> Section 4. A steward or officer may request permission from his supervisor to report on duty one hour early or late, and be relieved from duty one hour early or late, whichever may be required, to permit the steward to assist an employee who is working a different shift, in the processing of a grievance during both the steward's and employee's on-duty time. This request will be granted unless the change would result in the tour of duty extending over two days.

A. Positions of the Parties

The Agency contends that the proposal would interfere with its right under section 7106(a)(2)(B) to assign work by prohibiting it from assigning duties to the union officers or stewards during the first or last hour of a shift so that the employee could process grievances. The Agency also argues that Proposal 2 would have the effect of granting compensatory time to an employee in circumstances not authorized under 5 U.S.C. § 5543. The Agency further contends that the proposal is inconsistent with 5 C.F.R. § 610.121, a Government-wide regulation. It claims that the proposed adjustment would require the Agency to schedule employees on the basis of union representational activities rather than the Agency's mission as required by the regulation.

The Union contends that its proposal does not interfere with the Agency's right to assign work. The Union claims that Proposal 2 simply facilitates the use of official time by the Union and employees by providing for an adjustment in a union representative's shift to overlap the shift of an employee.

Such an adjustment, the Union explains, would permit the union representative and the employee to meet while both were in a duty status, using official time that the Agency had otherwise agreed to grant to the two employees. As to the separate matter of official time, the Union points out that employees are only permitted to request and management is only required to consider such requests. Management may decide that either the employee or the union representatives cannot be spared for particular times requested to conduct representational activities and thus may deny the request.

The Union also claims that the proposal would enhance an employee's ability to have the union representative of his or her choice. Finally, the Union contends that Proposal 2 would not require the grant of compensatory time since it would not affect the number of hours worked by an employee during the week.

B. Analysis and Conclusions

As the Authority has previously indicated, the parties may negotiate procedures and practices which do not negate an agency's rights but which would enable a union to implement its statutory rights and duties with respect to the representation of employees. See American Federation of Government Employees, AFL-CIO, Local 2272 and Department of Justice, U.S. Marshals Service, District of Columbia, 9 FLRA 1004, 1014-15 (1982) (Union Proposal 7). In National Treasury Employees Union, Chapter 66 and Internal Revenue Service, Kansas City Service Center, 1 FLRA 926 (1979), the Authority found that a proposal that would adjust the starting and quitting times of employees did not violate the agency's rights under section 7106(b)(1) and was within the duty to bargain. As explained by the Union, Proposal 2 is concerned simply with adjusting the starting and quitting times of union officials when those officials are processing grievances involving employees on shifts other than their own. Thus, the proposal would facilitate the carrying out of representational activities as an adjunct to whatever separate agreements directly concerned with use of official time that the parties are able to reach in particular circumstances. As the Union has indicated, the Agency may take into account its work assignment requirements in arriving at those separate agreements and in acting on individual requests pursuant to those agreements.

As interpreted, Proposal 2 is to the same effect as Proposal 1 in National Association of Government Employees, Local R14-8 and Veterans Administration Medical Center, Topeka, Kansas, 24 FLRA No. 17 (1986), which we found to be within the duty to bargain. For the reasons stated more fully in that decision, Proposal 2 is negotiable in this case. Additionally, like the proposal in VA Medical Center, Topeka, we find no basis upon which to conclude that the Union's proposal here either concerns a grant of compensatory time or requires the Agency to schedule employees in a manner other than that required by 5 C.F.R. § 610.121.

IV. Union Proposal 3

> ARTICLE 11
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> Section 2. When an employee changes work shifts, he will not be required to report for duty for two shift periods. The Dietetics Service will be exempted from this requirement.
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> Section 9. Employees will not be required to work more than two tours of duty in one workweek except to allow for a minimum of two shift periods between the end of one tour and the beginning of the next.

A. Positions of the Parties

The Agency contends that Union Proposal 3 is inconsistent with 5 C.F.R. § 610.121, a Government-wide regulation which requires it to schedule employees consistent with actual work requirements. The Agency argues that the proposal would require it to provide employees with two shift intervals between each shift worked by an employee regardless of actual work requirements.

The Union contends that the proposal does not conflict with the regulation cited by the Agency. It claims that Proposal 3 does not prevent the Agency from acting at all to schedule employees in accordance with mission requirements.

B. Analysis and Conclusion

The Authority finds that Union Proposal 3 is outside the duty to bargain for a reason other than that raised by the Agency. Union Proposal 3 is essentially the same as Union Proposal 2 in VA Medical Center, Topeka, which we found to violate management's right to assign work. The proposal in that case would have prohibited the agency from scheduling an employee to work on a shift if that employee had worked during the previous eleven hours, or to schedule an employee for two different tours of duty in the same week, regardless of the agency's actual work requirements and whether that employee's particular skills were needed on a particular shift. We found that the proposal would place a condition upon the agency's exercise of its right to assign work and could prevent the Agency from determining what duties were to be performed on what shift in violation of section 7106(a)(2)(B). Similarly, Union Proposal 3 here would prohibit the Agency from scheduling an employee to work on a shift where the employee had worked on one of the two preceding shifts, or to work two tours of duty in the same week, regardless of the Agency's work requirements. Accordingly, for the reasons set forth more fully in VA Medical Center, Topeka, we conclude that Union Proposal 3 here violates management's right to assign work and is outside the duty to bargain.

V. Union Proposal 4

> ARTICLE 11
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> Section 6. Except in cases that adversely affect patient care, employees' days off will be consecutive. Employees' days off will not be arbitrarily split. An employees' written request for split days off will be considered.

A. Positions of the Parties

The Agency contends that Union Proposal 4 is inconsistent with 5 C.F.R. § 610.121, a Government-wide regulation which requires it to schedule employees consistent with actual work requirements. It argues that Union Proposal 4 would require it to schedule employees for consecutive days off regardless of the Agency's actual work requirements. The Union disputes the Agency's contentions.

B. Analysis and Conclusion

The Authority finds that Union Proposal 4 is to the same effect as Union Proposal 3 which we held to be within the duty to bargain in the VA Medical Center, Topeka case. We found that the proposal in that case, which similarly would have provided employees with consecutive days off unless patient care would be adversely affected, was not inconsistent with management's rights and would not prevent the agency from scheduling employees consistent with actual work requirements as provided in 5 C.F.R. § 610.121. Union Proposal 4 here expressly states that the Agency need not provide employees with consecutive days off where patient care would be adversely affected. Accordingly, for the reasons set forth more fully in VA Medical Center, Topeka, we conclude that Union Proposal 4 is within the duty to bargain.

VI. Order

Pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request, or as otherwise agreed to by the parties, bargain concerning Union Proposals 1, 2 and 4.*/ IT IS FURTHER ORDERED that the petition for review as to Union Proposal 3 be, and it hereby is, dismissed.

Issued, Washington, D.C., November 21, 1986

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In finding these proposals to be within the duty to bargain, the Authority makes no judgment as to their merits.

24 FLRA No. 22

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEFENSE MAPPING AGENCY,
WASHINGTON, D.C. AND DEFENSE
MAPPING AGENCY AEROSPACE
CENTER, ST. LOUIS, MISSOURI

Respondents

and

Case No. 7-CA-50623

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, LOCAL 1827

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent, Defense Mapping Agency Aerospace Center, St. Louis, Missouri (DMAAC) had engaged in certain unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. The Judge further found that the Respondent, Defense Mapping Agency, Washington, D.C. (DMA) had not engaged in the unfair labor practices alleged in the complaint and recommended that the complaint, insofar as it alleged a violation by Respondent DMA be dismissed. Thereafter, the Respondents filed exceptions to the Judge's Decision concerning DMAAC. The General Counsel also filed exceptions limited to the Judge's discussion of "presumptive relevance."

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority adopts the Judge's findings, conclusions and recommended Order.

In agreement with the Judge, the Authority concludes that the Respondent (DMAAC) violated section 7116(a)(1), (5) and (8) of the Statute by failing and refusing to furnish the Charging Party (Union) with certain data from the Inspector General's 1985 Report it requested pursuant to section 7114(b)(4) of the Statute.

In so concluding the Authority notes that the Judge specifically found, after considering the nature of the request and the circumstances in the case, that the information sought by the Union was necessary for it to perform its representational duties within the meaning of section 7114(b)(4) of the Statute, and further did not constitute guidance, advice, counsel or training for management representatives under section 7114(b)(4)(C).*/ In particular the Judge considered, among other things, the fact that: the report contained material obtained after management spoke and conferred with unit employees; the report contained information related to unit employees' conditions of employment (for example, health, safety, security, etc.); and the Union was willing to accept the report in a sanitized form.

Therefore, in the circumstances of this case, we conclude in agreement with the Judge that the requested information was necessary in order for the Union to perform its representational duties.

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Defense Mapping Agency Aerospace Center, St. Louis, Missouri shall:

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*/ Noting the Judge's finding in this regard, we conclude, contrary to the General Counsel's exceptions, that the Judge did not apply a "presumptive relevance" standard. Rather, he found, and we agree, that the information was necessary in the circumstances of this case within the meaning of section 7114(b)(4) of the Statute.

1. Cease and desist from:

(a) Failing and refusing to furnish to the National Federation of Federal Employees, Local 1827 those portions of the 1985 Defense Mapping Agency Inspector General's Report containing factual findings of unit employees' conditions of employment at Defense Mapping Agency Aerospace Center, St. Louis, Missouri.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action:

(a) Upon request, provide to the National Federation of Federal Employees, Local 1827 those portions of the 1985 Defense Mapping Agency Inspector General's Report containing factual findings of unit employees' conditions of employment at Defense Mapping Agency Aerospace Center, St. Louis, Missouri. The report may be sanitized to exclude management's opinion and evaluation of internal matters and DMAAC's operations.

(b) Post at its facility at St. Louis, Missouri, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Director and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where such notices are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that insofar as the complaint alleges a violation of section 7116(a)(1), (5) and (8) of the Statute by Respondent Defense Mapping Agency, Washington, D.C., it is hereby dismissed.

Issued, Washington, D.C., November 21, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to provide the National Federation of Federal Employees, Local 1827 those portions of the 1985 Defense Mapping Agency Inspector General's Report containing factual findings of unit employees' conditions of employment at Defense Mapping Agency Aerospace Center, St. Louis, Missouri.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, provide to the National Federation of Federal Employees, Local 1827 those portions of the 1985 Defense Mapping Agency Inspector General's Report containing factual findings of unit employees' conditions of employment at Defense Mapping Agency Aerospace Center, St. Louis, Missouri. The report may be sanitized to exclude management's opinion and evaluation of internal matters and DMAAC's operations.

____
(Activity)

Dated: ____________ By: ____________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VII, Federal Labor Relations Authority, whose address is: 535 - 16th Street, Suite 310, Denver, CO 80202, and whose telephone number is: (303) 837-5224.

(24 FLRA No. 22)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEFENSE MAPPING AGENCY,
WASHINGTON, D.C. and DEFENSE
MAPPING AGENCY AEROSPACE
CENTER, ST. LOUIS, MISSOURI

Respondent

and

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, LOCAL 1827

Charging Party

Case No.: 7-CA-50623

Howard Bishop, Jr., Esq.
For Respondent

Cathy A. Auble, Esq.
For General Counsel

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on December 12, 1985, by the Regional Director for the Federal Labor Relations Authority, Region VII, a hearing was held before the undersigned on January 15, 1986 at St. Louis, Missouri.

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, et seq. (herein called the Statute). It is based on a second amended charge filed on December 9, 1985 by National Federation of Federal Employees, Local 1827 (herein called the Union) against Defense Mapping Agency, Washington, D.C. (herein called DMA or Respondent DMA) and Defense Mapping Agency Aerospace Center, St. Louis, Missouri (herein called DMAAC or Respondent DMAAC).

The Complaint alleged, in substance, that on or about August 8 and September 5, 1985 the Union requested Respondent DMAAC to furnish it with the sanitized Inspector General Report regarding the 1985 inspection conducted at its facility in St. Louis, Missouri. The said data, it is alleged, was necessary for full and proper discussion, understanding and negotiation of subjects within the scope of bargaining.

The Complaint also alleged that on or about August 15 and September 11, 1985, (a) Respondent DMA instructed Respondent DMAAC not to furnish the information requested by the Union; (b) Respondents failed and refused to furnish the information so requested - all of which constituted a failure to comply with Section 7114(b)(4) of the Statute and is violative of Section 7116(a)(1), (5) and (8) thereof.

Respondent's Answer, while admitting that DMAAC refused to furnish the data sought by the Union, denied that it was requested in sanitized form. It also denied the commission of any unfair labor practices under the Statute.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter briefs were filed with the undersigned, which have been duly considered.[1]

Upon the entire record herein, from my observation of the witnesses and their demeanor and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the Union has been, and still is, the exclusive bargaining representative of all non-professional employees of the Defense Mapping Agency Aerospace Center located in the St. Louis, Missouri area, with specified exclusions from the aforesaid unit.

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[1] Subsequent to the hearing, General Counsel filed a Motion to Correct the Transcript. No objections having been filed thereto, and it appearing that the proposed corrections are proper, the Motion is granted as requested.

2. At all times material herein the Union and Respondent DMAAC were parties to a collective bargaining agreement covering the employees in the aforesaid unit.

3. The DMA, whose headquarters are in Washington, D.C., supports the Joint Chief of Staff and the Services with mapping, charting, and geodetic information. It produces maps and charts of terrain which are used by the Army, Navy, Air Force and Marines.

4. The DMAAC is a component of DMA. It produces aeronautical type charts and associated products used in aviation, as well as digital products used in command and control and weapon systems. The DMAAC has about 4,000 employees.

5. Attached to DMA is an Inspector General (IG) who, together with his staff, conducts an inspection annually of DMAAC. This is done in order to evaluate to component's management and determine its effectiveness, efficiency and readiness to perform its mission. The IG reviews the regulations published by the agency, management reports, and complaints registered by employees since the previous inspection. His staff is on the lookout for fraud, abuse or waste.

6. Upon conducting his inspection the IG holds "sensing" sessions with the DMAAC employees. These are undertaken to ascertain what are the problems from the viewpoint of employees. A briefing session is held with the Command group, and the IG staff speaks to top managers, supervisors and employees.

7. A report is written by the IG which provides the DMA Director with an evaluation of DMAAC's operations. It is a narrative summary with findings on problem areas or deficiencies. The report covers such matters as: compliance with statutes and regulations; health and safety; security clearances; and classification of positions. While conditions of employment are discussed in the report, no attempt is made to deal therein with the performance of DMAAC employees. It is deemed to be a management report which discusses the cause and effect of problems and deficiencies. Although recommendations may be made by the IG, he has no authority to implement them or to order anything to be done by DMAAC.

8. Record facts show that the Union received a copy of the IG report from DMA in 1980 which it used in connection

with negotiations for the 1982 contract.[2] Further, that it utilized a copy of an IG report from DMAAC when negotiating the 1977 contract.

9. In June, 1985 Colonel Maune, as IG for Respondent DMA, headed a team which conducted an inspection of DMAAC. Maune met with Virgil Hahn, then president of the Union, as well as Elmer Hacker, then secretary-treasurer[3] of the Union, and Francis Jett, its chief shop steward. Several matters or subjects which were raised by the Union included: EEO, security problems of employees, mandatory overtime, and a classification appeal involving the photographers.[4] IG Maune spoke to at least 20 individuals re these problems.

10. In a letter dated August 8, 1985, Elmer Hacker, president of the Union, wrote L.P. Eaves, Labor Relations Officer for DMAAC, and requested a copy of the IG inspection report of 1985. The request was made in accordance with Article 14-1 and 14-2 of the collective bargaining agreement.

11. Under Article 14-1 and 14-2 of the parties' agreement Respondent DMAAC is obliged to furnish all information, data or material which is relevant and necessary for the discharge of the Union's obligation under Public Law 95-45 and the agreement. This was stated to include, but not limited to, such copies of such terms as: (a) OPM, MSPB, DMA Regulations, AC instructions, or other regulations bearing on policies, practices, procedures and working conditions; (b) DOD & EEOC Regulations; (c) Mini-EEO Plans of Affirmative Action; (c) Specific information requested for investigating or processing complaints/grievances/appeals. Statistical data supplied shall be from documents normally maintained in the regular course of business and in reasonably understandable form.

2/ Virgil Hahn, who was president of the Union from 1977 to August, 1985, testified he used the reports in negotiating merit promotions and equal opportunity concerns. Further, the 1980 report was used in respect to the number of employees to be placed on a promotion certificate.

3/ Hacker became president of the Union in August, 1985.

4/ This was a statutory appeal through OPM. It was not based on a Union grievance nor was the Union a party to the appeal.

12. The record reflects that the request for the 1985 IG report was made to learn the findings of the inspection that dealt with the employees, and their working conditions. Further, the Union wanted to see what, if any, violations of regulations occurred as well as any uses of regulations which were contrary to the bargaining agreement. In such instances, the Union insisted it may want to grieve over same.

13. Eaves replied to the Union's request in a letter dated August 15, 1985. He stated therein that the report is an internal, confidential management document which does not have to be released under Article 14 of the contract. He denied the request.

14. Following the written denial by Eaves discussions ensued between Eaves and Union officials Hacker and Jett re the IG report of 1985. The Union representatives attempted to obtain the report by persuading Eaves to furnish same. They also indicated a willingness to accept it in a sanitized form. Eaves refused, again repeating that the report contained confidential information. The record reflects that the Eaves made the decision to deny the Union's request, and that he had not been instructed by DMA to do so.5/

15. In a letter dated September 5, 1985 Hacker renewed the Union's request for the IG report, reciting that it was needed because the Union believed the report contained a survey and analysis of personnel policies, practices or conditions of employment. Further, Hacker stated it was essential that it be reviewed so that the Union could police its contract and assess the impact upon actual or potential grievances.

5/ Hacker testified he did not remember whether Eaves said he had been directed not to give the report to the Union, or whether "that was what came across. . ." He also stated he "got the impression" it came from headquarters. Jett testified that Eaves told the Union representatives he had been directed not to release the report but did not identify who so directed him. The state of the record, together with the lack of certitude in the testimonies of the Union officials, persuades me that the decision not to release the report was made by Eaves; that, further, there is no independent evidence that he was directed by DMA not to furnish same to the Union.

16. The aforesaid request was again denied in a letter dated September 11, 1985 from Eaves to Hacker.

17. Hacker testified that four named employees in the bargaining unit have seen the 1985 IG report and were allowed to read it. Further, that the Civilian Welfare Committee had access to it. Hacker also testified the a named non-bargaining unit employee, a restaurant officer, had read the report. The basis for the foregoing, rested on the Union president's testimony that these named individuals told him they had read the document. Eaves testified he was unaware of any instances where prime IG reports were released to the Union. Colonel Stockhausen the IG, testified the report is not to be disseminated and it is the policy to keep the report within the management staff. The testimony by Hacker regarding the fact that other employees have been permitted to read the report is heresay in nature. Moreover, there is nothing else in the record supporting a finding that management provided others with the 1985 IG report. While it may have occurred, I do not find that Respondents either gave the report to non-management people or afforded them an opportunity to read it. The IG report was considered by Respondents to be confidential in nature and for distribution only to management personnel.

18. DMA published an instruction dated August 29, 1984, currently in effect, which is designated as DMA INSTRUCTION 5700.2. It deals with the subject: "The Defense Mapping Agency Inspection Program." (Resp. Exh. 1). The Inspection Program applies to DMA Headquarters and the DMA Components. It is designed, according to the Instruction, to check the readiness of the components to perform its mission and the efficiency of its operation. The Inspector General of DMA is charged with responsibility to conduct the inspection. He is mandated to schedule personal conference periods so individuals may present complaints or request advice; to schedule "sensing" sessions to sample non-managerial employees for their opinions on different topics, including such items as security, facilities, safety, logistics and operations (paragraph 10 (h) and (i), Resp. Exh. 1) DMAAC is required to follow the procedures established under DMA INSTRUCTION 5700.2. Paragraph 12(b) of the INSTRUCTION, entitled "Inspection Reports", provides that the reports are privileged documents and not releasable to anyone outside the DMA without the approval of the Director, DMA.

Conclusions

It is contended by General Counsel that Respondent DMAAC was obliged, under 7114(b)(4) of the Statute to furnish the

Union with the IG Report covering the St. Louis facility. The report, it is asserted, includes information obtained from unit employees whose working conditions would be impacted by any changes resulting from the investigation. General Counsel insists that the Union needs the Report in order to police the contract, as well as effectively represent employees in discussions with management. Having refused to provide the said data, Respondent DMAAC has allegedly run afoul of 7116(a)(1), (5) and (8) of the Statute.

A further contention is made that Respondent DMA, the headquarters in Washington, D.C., violated 7116(a)(1) and (5) by instructing and directing Respondent DMAAC - its component - not to furnish the IG Report to the Union.

Respondents, in disputing any obligation to supply the Report, insist that: (a) The Union's requests were not specific and definitive so as to establish that the data was necessary and relevant to its representational functions; (b) the requested information is not necessary nor relevant for the Union to perform such duties; (c) under 7114(b)(4) of the Statute it is not encumbent on Respondent to furnish the report since it is an internal management document which has no direct relationship to conditions of employment; (d) Respondent DMA, the headquarters, is in no event responsible for any refusal to furnish the IG Report since the decision was made by Respondent DMAAC alone.

In conformity with its obligation to negotiate in good faith, an agency is required to furnish data to the bargaining representative under certain circumstances. This obligation is codified in Section 7114(b) of the Statute, the pertinent provisions of which are as follows:

> Representation rights and duties
>
> . . . . .
>
> (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation -
>
> . . . . .
>
> (4) in the case of an agency, to furnish to the exclusive representative

> involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--
>
> (A) which is normally maintained by the agency in the regular course of business;
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; . . .

Under the foregoing statutory language it must be shown that the information requested is necessary for the union to fulfill its representational functions. In this respect consideration must be given to the nature of the request for the data as well as the circumstances in each case. See Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, 17 FLRA No. 92, Respondents herein insist that the requests by the Union were too broad and unspecific to permit DMAAC to determine if the information was relevant and necessary to the Union's representational function. It is contended that the requests failed to identify the type of information sought by specific subject matter.

It is true that an obligation is imposed upon a union to request data in a manner which will not compel an agency to speculate or conjecture as to what is sought by the representative. The Authority has frowned on requests which are broader than what is reasonably needed to administer or police contractual provisions of an agreement. Thus, a failure to mention time periods for certain conformation re contracts "let out" was deemed indefinite. Director of Administration, Headquarters, U.S. Air Force, 6 FLRA No. 24. Further, as stated therein by Judge Dowd, the Union's right to information "for the purpose of contract administration and policing a particular contract provision has support in the case law only where the union is able to show relevance." Thus, a mere assertion by a union that it needs data to process a grievance does not automatically oblige an agency to furnish same. No presumptive relevance necessarily attaches thereto. See Department of the Treasury, United States Customs Service, Region IV, Miami, Florida, 18 FLRA No. 53.

In the case at bar I am not persuaded that, in light of the circumstances, the request for the IG Report by the Union was too broad or indefinite so as to vitiate any responsibility on management's past to furnish same. In regard to the request made on August 8, 1985, I would agree that it reflects no relevance nor necessity for the data within the meaning of 7114(b)(4)(B). The mere assertion that the demand was in accordance with Article 14-1, 14-2 of the collective bargaining agreement discloses no relevance. Such a request is not tied to any specific employment condition nor does it show, on its face, that it is necessary to negotiating any subject with management. While the particular article of the agreement, which was mentioned in the said request, obliges the agency to furnish information to the Union, it refers to various government rules and regulations. Further, it merely requires that DMAAC supply data needed for the Union's investigating or processing complaints or grievances. Such a provision does not dispense with the statutory requirement that the relevance and necessity for information be shown or declared in the request.

The record does reflect, however, that on September 5, 1985 the Union renewed its request for the IG Report. More definitely, it stated the Union believed the Report contained a survey and analysis of personnel practices, policies and working conditions; that the Union wanted to review the Report in order to police the contract and assess its impact on possible grievances. Moreover, the Union indicated its willingness, after Eaves refused the initial request on August 15, 1985, to accept the Report in sanitized forms, at which time management advised the Union official it was confidential and couldn't be released. While this request may not be termed "presumptively relevant", the circumstances surrounding it warrant the conclusion that the demand was necessary for discussion, understanding and negotiation within the meaning of 7114(b)(4)(B). Support for this view is seen in light of the fact that: (a) the Report contained material obtained after management spoke and conferred with about 20 employees; (b) "sensing" sessions were held with employees inquiring as to problems concerning safety and equal opportunity; (c) the Report dealt with such subjects as health and safety, security, and position classifications; (d) the Union's willingness to accept a sanitized version of the said Report.

Since the Report contains information pertaining to the foregoing conditions of employment obtained, in part, after discussions with employees, it is certainly understandable that the Union would utilize this data in some negotiations with DMAAC. Further, it appears that the Union, based on its willingness to accept the Report after sanitization, was interested only in those aspects of the Report bearing on working conditions affecting the unit employees. While other aspects of the Report may involve a review or analysis of management, its supervisory hierachy, or internal operations, a request for information limited to these conditions of employment affecting the unit involves a demand for relevant and necessary data under the Statute. See American Federation of Government Employees, AFL-CIO, Local 1708 and Military Ocean Terminal, Sunny Point, Southport, S.C., 15 FLRA No. 1 (where the Authority deemed negotiable a union proposal that information derived from work studies be provided to the union).

A somewhat similar situation to the one at bar existed in Department of Health and Human Services, Social Security Administration, Field Assessment Office, 12 FLRA No. 84. Management dispatched its analysts to conduct a study of travel practices of its Evaluation Staff in a regional office. The analysts interviewed unit employees in regard thereto and then turned in reports with their findings. It was held that the agency must supply the reports to the extent they contain factual findings as to travel practices existent in the region. Since the reports contained facts elicited from employees re travel problems, it was concluded that the Region could be expected to maintain such information in its files for use in discussions with the union re travel problems in the region. Thus, the findings of the analysts in that regard were deemed "necessary" to collective bargaining.[6]

Respondents attempt to distinguish the foregoing case from the one at hand. It is asserted that the purpose of the IG Report was not to gather information for use in changing working conditions, which was the aim in the cited case. Further, that no bargaining or ongoing discussions with the Union herein were in progress, whereas the parties in the *Social Security* case, *supra*, were conferring re travel practices. I am satisfied, based on the record herein, that the Union was interested in the findings concerning working conditions as they affected employees. In its request the Union so stated. There is no indication that the bargaining representative wanted internal management data, and this is buttressed by a willingness to accept the Report on sanitized forms. It is not determinative that the parties herein were not engaged in contract discussions or negotiations. A union may utilize information in *preparation* for bargaining, or for proposals to management in connection with working conditions. It is not a prerequisite that actual bargaining be in progress before a union is entitled to necessary and relevant information. See *I. G. Case v. NLRB*, 253 F.2d 149 (7th Cir. 1958).

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[6] Cf. U.S. Customs Service, Region IV, Miami, Florida, 3 FLRA No. 127, where a "Tennant Study" which included interviews with employees, was made to verify the agency's records re overtime - to ascertain whether the agency was being properly reimbursed by the airlines or shipping firms for overtime services. In the case at bar the sessions with employees were held to find out from employees what they considered to be problems as to certain working conditions.

Respondents insist that the Report discusses matters outside the scope of bargaining. Further, that it contains opinions of management as well as evaluations which are not necessary to the union's representational functions. Nevertheless, Eaves testified that there were *terms in the Report that dealt with conditions of employment*. To the extent that the Report evaluated its operations at DMAAC and contained material of a confidential nature, I would agree that the Union would not be entitled to such data. See *Detroit Ednmo v. N.L.R.B.*, 440 U.S. 301. However, there is no issue of confidentiality herein inasmuch as the Union expressed its willingness to accept the Report in *sanitized* form. Under those circumstances Respondents need furnish only those factual findings based on discussions with unit employees concerning working conditions - the latter to include such matters as health and safety, security, and position description.

In sum, I conclude that the 1985 IG Report involving the component, Defense Mapping Agency Aerospace Center, St. Louis, Missouri, insofar as it pertains to data obtained from employees thereat concerning their various working conditions and employment is necessary and relevant for full and proper discussion, understanding and negotiation of collective bargaining subjects within the meaning of Section 7114(b)(4)(B); and that such portion thereof does not constitute guidance, advice, counsel or training for management representatives under subdivision (C) of that section.7/

7/ No issue was raised under subdivision (A) that the IG Report was not normally maintained by the agency in the regular course of business.

As such, the Union was entitled to receive same, and the failure or refusal by Respondent DMAAC to furnish said particular part of the Report was violative of Section 7116(a)(1), (5) and (8) of the Statute.

In respect to the responsibility of Respondent DMA for the refusal to furnish the data to the Union, I conclude that it played no part in such conduct. The Authority has held, it is true, that where higher level management prevents agency management at the level of exclusive recognition from fulfilling its bargaining obligation, such conduct will constitute an unfair labor practice. Department of Health and Human Services, et. al., 10 FLRA No. 9; Department of the Interior, Water and Power Resources Service, Grand Coulee Project, Grand Coulee, Washington, 9 FLRA No. 46. In both of the cited cases the higher level directed lower level management in respect to the action taken by the latter, which is markedly different from the occurrence herein. Record facts disclose that DMA headquarters in Washington, D.C. did not direct or order the component to refuse to furnish the data to the Union; that the decision to so refuse was made by Eaves, DMAAC's Labor Relation Specialist, with no impact or direction from the headquarters; and that the latter took no steps to prevent DMAAC from fulfilling its obligation to supply data as required under the Statute. Accordingly, I conclude Respondent DMA has not violated the Statute herein as alleged.

Having concluded that Respondent Defense Mapping Agency Aerospace Center, St. Louis, Missouri violated Section 7116(a)(1), (5) and (8) of the Statute, it is recommended that the Authority issue the following:

ORDER[8]

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute, the Authority hereby orders that the Defense Mapping Agency Aerospace Center, St. Louis, Missouri shall:

---

[8] While the recommended order herein provides for specified data on the IG Report to be furnished to the Union, the Report may be sanitized to exclude management's opinion and evaluation of internal matters and DMAAC's operation.

1. Cease and desist from:

(a) Failing and refusing to provide to National Federation of Federal Employees, Local 1827 those portions of the 1985 Defenses Mapping Agency Inspector General's Report containing factual findings of unit employees' conditions of employment at Defense Mapping Agency Aerospace Center, St. Louis, Missouri.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action:

(a) Upon request, provide to National Federation of Federal Employees, Local 1827 those portions of the 1985 Defense Mapping Agency Inspector General's Report containing factual findings of unit employees' condition of employment at Defense Mapping Agency Aerospace Center, St. Louis, Missouri.

(b) Post at its facility at St. Louis, Missouri, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Director, or his designee, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including bulletin boards and other places where notices are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director, Region VII, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

IT IS HEREBY FURTHER ORDERED that the Complaint insofar as it alleges a violation of Section 7116(a)(1), (5) and (8) of the Statute by Respondent Defense Mapping Agency, Washington, D.C. be, and it hereby is, dismissed.

WILLIAM NAIMARK
Administrative Law Judge

Dated: June 6, 1986
Washington, D.C.

(24 FLRA No. 22)

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to provide the National Federation of Federal Employees, Local 1827 those portions of the 1985 Defenses Mapping Agency Inspector General's Report containing factual findings of unit employees' conditions of employment at Defense Mapping Agency Aerospace Center, St. Louis, Missouri.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, provide to National Federation of Federal Employees, Local 1827 those portions of the 1985 Defense Mapping Agency Inspector General's Report containing factual findings of unit employees' conditions of employment at Defense Mapping Agency Aerospace Center, St. Louis, Missouri.

____
(Agency or Activity)

Dated: ________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VII, whose address is: 535 - 16th Street, Suite 310, Denver, CO 80202, and whose telephone number is: (303) 837-5224.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VII, whose address is: 535 - 16th Street, Suite 310, Denver, CO, 80202, and whose telephone number is: (303) 837-3427.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, COUNCIL OF
PRISON LOCALS, LOCAL 171

Union

and

Case No. O-NG-1172
(23 FLRA NO. 29)

DEPARTMENT OF JUSTICE, FEDERAL
PRISON SYSTEM, FEDERAL CORRECTIONAL
INSTITUTION, EL RENO, OKLAHOMA

Agency

ORDER DENYING MOTION FOR RECONSIDERATION

This matter is before the Authority because of the Agency's request for reconsideration and "Motion to Amend" the Authority's Decision and Order on Negotiability Issues of August 15, 1986, in the above-entitled matter. Specifically, the Agency seeks reconsideration of the Authority's order as to Provisions 1 and 3. The Union filed an opposition.

In its decision, the Authority found negotiable Provisions 1 and 3 of the parties' local supplemental agreement covering assignments and hours which had been disapproved by the Agency under section 7114(c) of the Statute. Consequently, the Authority ordered the Agency to rescind its disapproval of these provisions. The Authority based its determinations that Provisions 1 and 3 were negotiable on the Union's clear, unequivocal statements of intent in the petition for review concerning each provision, which statements were found to be consistent with the language of each provision. Although the Agency acknowledged that in view of the Union's statements of intent its disapproval of the two provisions may be moot the Agency continued to maintain that the provisions were nonnegotiable. As to the Agency's continued claims of nonnegotiability the Authority stated in a footnote that since the Union's clear, unequivocal statements of intent concerning the provisions showed that the Agency's claims of nonnegotiability were baseless, "any disagreement over these provisions should have been resolved bilaterally." Thus, the Authority urged the Agency "to act in a more positive manner, so as not to burden the Union and the Authority with the resolution of unnecessary disputes."

The Agency does not challenge the Authority's holding that Provision 1 and 3 are negotiable. Instead, it contends, first, that the Authority committed an error in finding that the Agency had "disapproved" the provisions under section 7114(c) of the Statute. Rather, the Agency states that because each of the provisions was subject to a negotiable as well as a nonnegotiable interpretation, it merely sought to clarify the meaning of the two provisions by holding them negotiable so long as the Union accepted the Agency's interpretation of their meaning. Thus, the Agency requests the Authority to correct its order requiring the Agency to rescind its disapproval of these provisions because "so interpreted, the proposals were never disapproved." Second, the Agency states that if it is forced to stop its practice of providing alternative or conditional approvals when a contract provision is subject to both negotiable and nonnegotiable interpretations because of the comments such as these contained in the Authority's footnote, "the result will clearly be to produce more, not fewer appeals." Thus, the Agency further requests that the Authority either delete or alter the footnote in question.

Section 2429.17 of the Authority's Rules and Regulations provides that a party which can establish "extraordinary circumstances" may request reconsideration of an Authority decision. We conclude that the Agency has not established such "extraordinary circumstances." Specifically, we view the Agency's arguments as simply disagreeing with the Authority's interpretation of the record and legal determinations that the Agency disapproved the two provisions in question.

Moreover, we reject the Agency's claim that the Authority's footnote urging the Agency to act in a positive manner so as to further the bilateral resolution of negotiability issues must increase rather than decrease the number of negotiability appeals. In our view, this request for reconsideration confirms our observations that the Agency in this case should have resolved without our involvement its questions regarding the meaning of language which was negotiated and agreed to by the parties at a local level within the Agency.

Consequently, we conclude that the Agency has failed to establish the existence of extraordinary circumstances and deny its request for reconsideration.

Issued, Washington, D.C., November 21, 1986.

L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

9/ Case 406

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 406 REPORT OF CASE DECISIONS November 26, 1986

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24 FLRA No. 26 (November 26, 1986)

Department of the Air Force, Headquarters Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and American Federation of Government Employees, Council 214, AFL-CIO, Case No. 5-CA-40259

24 FLRA No. 27 (November 26, 1986)

Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire and Federal Employees Metal Trades Council, AFL-CIO, Case No. 1-CA-40290

24 FLRA No. 28 (November 26, 1986)

Department of the Air Force, Scott Air Force Base, Illinois and National Association of Government Employees, SEIU, Local R7-23, Case No. 5-CA-40232

Y3.F31/21-3:

NEGOTIABILITY CASES

24 FLRA No. 24 (November 21, 1986)

International Federation of Professional and Technical Engineers, Local 12 and Department of the Navy, Puget Sound Naval Shipyard, Case No. O-NG-1003

24 FLRA No. 25 (November 10, 1986)

National Border Patrol Council, American Federation of Government Employees, AFL-CIO and Department of Justice, Immigration and Naturalization Service, Case Nos. O-NG-664 and O-NG-682

REPRESENTATION CASE

24 FLRA No. 23 (November 21, 1986)

Department of the Treasury, Bureau of the Mint, U.S. Mint, Denver, Colorado and American Federation of Government Employees, AFL-CIO, Local 695, Case No. 7-CU-60009

Federal
Labor Relations
Authority

24 FLRA No. 23

Dep't of the Treasury, Bureau of the Mint, U.S. Mint, Denver, Col. and AFGE, Local 695, Case No. 7-CU-60009
(Decided November 21, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE

REPRESENTATION PROCEDURE
   NO BASIS FOR GRANTING REVIEW
      MERE DISAGREEMENT WITH THE REGIONAL DIRECTOR

DIGEST NOTES

The Authority denied an application for review of a Regional Director's Decision and Order on Petition for Clarification of Unit because no compelling reason existed within the meaning of section 2422.17(c) of the Authority's rules and regulations for granting review.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

READEX FICHE best copy available

Federal Labor Relations Authority

24 FLRA No. 24

International Federation of Professional and Technical Engineers, Local 12 and Dep't of the Navy, Puget Sound Naval Shipyard, Case No. 0-NG-1003
(Decided November 21, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
NEGOTIABILITY PROCEDURE	7105(a)(2)(D) and (E)
SPECIFICITY	7117(a)(2)
PROPOSAL IS SUFFICIENTLY SPECIFIC AND DELIMITED	
COMPELLING NEED [7117(a)(2)]	
AGENCY REGULATIONS FOR WHICH A COMPELLING WAS ALLEGED	
AGENCY REGULATIONS MANDATED BY OUTSIDE AUTHORITY	
DON, TRAVEL ADMINISTRATION REGULATIONS	
ESSENTIAL TO THE ACCOMPLISHMENT OF THE AGENCY MISSION	
DON, TRAVEL ADMINISTRATION REGULATIONS	
TRAVEL	
ALLOWANCES / PAYMENTS / REIMBURSEMENT OF EXPENSES	
ADVANCE PAYMENTS PRIOR TO TRAVEL	
WAIVER OF RIGHTS	

DIGEST NOTES

A proposal is negotiable that would prohibit the agency from making any changes to existing practices regarding the advance payment of travel allowances. The agency sought to limit travel advances to 80% of the estimated per diem and miscellaneous costs; not to make advance travel payments for one day trips; not make travel advances more than three days prior to the trip; and to require travelers who received overpayments of allowances to make repayment within 15 days from the date of the notification of overpayment. The proposal to make no change was sufficiently specific and delimited for the Authority to measure what is proposed for negotiation against specific statutory or regulatory provisions alleged to bar negotiations. There was no evidence that the union waived its right to negotiate on the proposal. Finally, the Authority held that there was not a compelling need of an agency regulation alleged to bar negotiations on the proposal. Contrary to the agency's contentions, the agency's regulation alleged to bar negotiations was not essential to the accomplishment of the agency's mission nor was the agency's regulation mandated by an outside authority.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

**Federal
Labor Relations
Authority**

24 FLRA No. 25

National Border Patrol
Council, AFGE and Dep't of
Justice, INS, Case Nos.
0-NG-664 and 0-NG-682 (Decided
November 10, 1986)

SUBJECT MATTER INDEX ENTRIES

CODE OF FEDERAL REGULATIONS
  5 C.F.R. 550.150-.164
COLLECTIVE BARGAINING PROCESS AND THE DUTY TO BARGAIN
  QUESTION CONCERNING REPRESENTATION (QCR)
  GROUND RULES
NEGOTIABILITY PROCEDURE
  RECONSIDERATION OF AUTHORITY DECISIONS
    AUTHORITY MISINTERPRETED APPLICABLE LAW (ALLEGED)
      5 U.S.C. 5545(c)
    AUTHORITY MISINTERPRETED APPROPRIATE REGULATION (ALLEGED)
      5 C.F.R. 550.150-.164
    INCORRECT FORUM ALLEGED
    QUESTION CONCERNING REPRESENTATION PENDING (ALLEGED)
    PREMIUM PAY
PREMIUM PAY
  COLLECTIVE BARGAINING
    EMPLOYEE'S PARTICIPATION IS A NEGOTIABLE GROUND RULE
UNITED STATES CODE
  5 U.S.C. 5545(c)

STATUTE

7116(d)
7131(a)

DIGEST NOTES

The Authority rejected a request for reconsideration of two previous negotiability decisions (23 FLRA No. 11 and 23 FLRA No. 17) concerning the calculation of administratively uncontrollable overtime. Contrary to the agency's claim that the Authority did not address a question concerning representation (QCR) raised by a RO petition in either decision, the Authority noted that the QCR was resolved and thus, no longer pending, prior to the issuance of either of the two decisions.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Second, the agency's claim that the Authority misapplied precedent to find that the union properly complied with section 2424.5 of the rules in 23 FLRA No 17 was without merit. The case relied upon by the agency was inapposite. It involved an interpretation of section 7116(d) of the Statute which precludes matters being raised under both the ULP procedures and under a negotiated grievance procedure. Section 2424.5 of the Authority's rules at issue in this case does not preclude a matter from being raised under both the negotiability and ULP procedures but only provides that the Authority will not ordinarily process the issue under both procedures simultaneously.

The agency's argument that the questions concerning the scope of the duty to bargain raised in 23 FLRA No. 17 involves factual determinations which, under established precedent, are to be resolved in other appropriate proceedings, constitutes nothing more than disagreement with the Authority's holding.

The agency argued that the Authority misinterpreted 5 U.S.C. 5545(c) and 5 C.F.R. 550.150.-.164 governing the calculation of administratively uncontrollable overtime; the proposals in both cases do constitute attempts to bargain over rates of pay in violation of law; there is a compelling need of the agency's regulation to bar negotiation of both proposals; and the proposal in 23 FLRA No. 11 would violate section 7131(a) of the Statute and a decision of the Federal Labor Relations Council precluding payment of AUO of collective bargaining negotiations. The argument that the proposal in 23 FLRA No. 11 concerns bargaining over rates of pay merely constitutes an attempt to argue a matter not previously raised. The remaining arguments simply constituted disagreements with the Authority's interpretation of the record and legal determinations under applicable law and regulation.

Federal
Labor Relations
Authority

24 FLRA No. 26

Dep't of the Air Force, H.Q.
Air Force Logistics Command,
Wright-Patterson Air Force
Base, Ohio and AFGE, Council
214, Case No. 3-CA-40259
(Decided November 26, 1986)

SUBJECT MATTER INDEX ENTRIES

AGENCY ULP (ALLEGED) 7116(a)(8)
  7131(c)
CODE OF FEDERAL REGULATIONS
  5 C.F.R. 1201.33
  28 C.F.R. PART 21
OFFICIAL TIME [7131]
  AUTHORITY MANDATED PARTICIPATION IN ANY PHASE OF A PROCEEDING
  TRAVEL AND PER DIEM
    AUTHORITY MANDATED PARTICIPATION IN A PROCEEDING [7131(c)]
PROCEDURE
  FORUMS
    ALJ DECISIONS, APPEALS OTHER THAN FILING EXCEPTIONS
      RULINGS MAY NOT BE COLLATERALLY ATTACKED IN LATER CASE
UNFAIR LABOR PRACTICES, PROCEDURE
  WITNESSES
    OFFICIAL TIME
    TRAVEL AND PER DIEM
UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
  OFFICIAL TIME, PROVIDE
  ANNUAL LEAVE RESTORED
UNITED STATES CODE
  5 U.S.C. 5751
  5 U.S.C. 5751(a)
  5 U.S.C. 6322
  5 U.S.C. 5701 ET SEQ.[TRAVEL EXPENSE ACT]

STATUTE

7104(f)(2)(B)
7116(a)(1) and (8)
7118
7131(a) and (c)
7134

DIGEST NOTES

The activity violated sections 7116(a)(1), (5) and 7131(c) when it refused to provide official time, travel and per diem expenses to an employee who had been subpoenaed by the General Counsel of the FLRA to appear as a witness at a hearing. Under section 7131(c), "the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in duty status."

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

The Authority's regulations (5 C.F.R. 2429.13) providing for official time and payment of travel and per diem expenses in these circumstances is a continuation of the practice established by the Assistant Secretary of Labor for Labor-Management Relations for the conduct of hearings under Executive Order 11491, as amended. Presumably, Congress was aware of this practice when it enacted the Statute; however, unlike in some other areas, there is no indication in the legislative history of any Congressional intent to change this practice. The regulation assures employees whose participation in a proceeding is deemed necessary by an Authority agent that they may testify without concern over whether authorization for necessary travel and per diem expenses will be granted by their employing agency. This practice is consistent with that of other Federal agencies having analogous responsibilities to adjudicate matters involving federal employees.

Federal Labor Relations Authority

24 FLRA No. 27

Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H. and Federal Metal Trades Council, Case No. 1-CA-40290 (Decided November 26, 1986

SUBJECT MATTER INDEX ENTRIES

AGENCY ULP (ALLEGED) 7116(a)(5)
INFORMATION
AGENCY ULP (ALLEGED) 7116(a)(8)
7114(b)(4)
CODE OF FEDERAL REGULATIONS
5 C.F.R. PART 294, SUBPART G
FEDERAL PERSONNEL MANUAL
CHAPTER 294
LETTER 294-6 [JULY 25, 1977]
SUPPLEMENT 771-1, INSTRUCTION 18
INFORMATION, EMPLOYEE AND UNION RIGHTS UNDER THE STATUTE
ALTERNATE MEANS OF ACCOMPLISHING THE OBJECTIVE
MERE EXISTENCE INSUFFICIENT FOR DENIAL OF NAMES AND ADDRESSES
TYPES OF INFORMATION SOUGHT
NAMES AND ADDRESSES OF EMPLOYEES
UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
INFORMATION TO BE PROVIDED UNION
UNITED STATES CODE
5 U.S.C. 552a [PRIVACY ACT]
5 U.S.C. 552 [FREEDOM OF INFORMATION ACT]
5 U.S.C. 552(b)(6)

STATUTE

7114(a)(1) and (b)(4)
7116(a)(1), (5) and (8)
7118

DIGEST NOTES

The activity violated sections 7114(b)(4), 7116(a)(1), (5) and (8) when it failed to furnish the union with the names and addresses of employees in the bargaining unit which the union exclusively represents. The release of such information is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets all of the other requirements established by section 7114(b)(4). The release of the information is generally required without regard to whether alternative means of communication are available.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal
Labor Relations
Authority

24 FLRA No. 28

Dep't of the Air Force, Scott Air Force Base, Ill. and NAGE, SEIU, Local R7-23, Case No. 5-CA-40232 (Decided November 26, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
AGENCY ULP (ALLEGED) 7116(a)(5)	7114(b)(4)
INFORMATION	7116(a)(1), (5) and (8)
AGENCY ULP (ALLEGED) 7116(a)(8)	7118
7114(b)(4)	

INFORMATION, EMPLOYEE AND UNION RIGHTS UNDER THE STATUTE
  ALTERNATE MEANS
    MERE EXISTENCE INSUFFICIENT FOR DENIAL OF NAMES/ADDRESSES
  TYPES OF INFORMATION SOUGHT
    NAMES AND ADDRESSES OF EMPLOYEES
UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
  INFORMATION TO BE PROVIDED UNION
UNITED STATES CODE
  5 U.S.C. 552a [PRIVACY ACT]

DIGEST NOTES

The activity violated sections 7114(b)(4), 7116(a)(1), (5) and (8) when it refused to provide the exclusive representative with the home addresses of new employees. The release of such information is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets all of the other requirements established by section 7114(b)(4). The release of the names and home addresses of unit employees is generally required without regard to whether alternative means of communication are available.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

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24 FLRA No. 23

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE TREASURY
BUREAU OF THE MINT
U.S. MINT
DENVER, COLORADO

Activity

and

Case No. 7-CU-60009

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 695

Petitioner

ORDER DENYING APPLICATION FOR REVIEW

On October 20, 1986, the American Federation of Government Employees, AFL-CIO, Local 695 (AFGE) filed a timely application for review pursuant to section 2422.17(a) of the Authority's Rules and Regulations, seeking to set aside the Regional Director's Decision and Order on Petition for Clarification of Unit in the above-named case. In its application for review, AFGE contends that compelling reasons exist within the meaning of section 2422.17(c) of the Authority's Rules and Regulations for granting the application.

Upon consideration of AFGE's application for review, including all arguments in support thereof, the Authority concludes that no compelling reason exists for granting the application. Rather, the application in essence expresses mere disagreement with the Regional Director's findings, which are based on precedent, and have not been shown to be clearly erroneous or to have prejudicially affected the right of any party.

Accordingly, pursuant to section 2422.17(f)(3) of the Authority's Rules and Regulations, the application for review of the Regional Director's Decision and Order on Petition for Clarification of Unit is denied.

Issued, Washington, D.C. November 21, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNATIONAL FEDERATION OF PROFESSIONAL
AND TECHNICAL ENGINEERS, LOCAL 12

Union

and

Case No. 0-NG-1003

DEPARTMENT OF THE NAVY
PUGET SOUND NAVAL SHIPYARD

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of a Union proposal to rescind changes in the Agency's regulations regarding administration of travel advances. We find that the proposal is negotiable.

II. Union Proposal

The Union in essence proposes that there be no changes in the Agency's practice regarding the payment of travel and per diem advances which existed prior to the issuance of proposed Shipyard Notice, NAVSHIPYDPUGETNOTE 4650.

III. Positions of the Parties

Preliminarily, the Agency contends that the Union's petition for review is deficient and should be dismissed. Substantively, the Agency contends that the Union has clearly and unmistakably waived its right to bargain over the matter at issue. It also contends that the Union's proposal conflicts with an Agency regulation for which there is a compelling need. The Union essentially argues that the Agency's contentions are all without merit.

IV. Analysis

A. Preliminary Contention

The Agency contends that the Union's petition is deficient and should be dismissed because it does not set forth the matter proposed to be negotiated in sufficiently specific and delimited form as to be subject to a negotiability decision by the Authority. However, it is clear from the record and the parties' submissions including the Agency's substantive contentions that the parties understood that the Union wants no change in existing practice regarding the administration of travel advances. For example, the Union's petition includes a reference to correspondence between the parties indicating that the "Union's proposals will be no change in existing practice." See Union's Petition for Review, Enclosure 6. Therefore, the Union's proposal is sufficiently specific and delimited so that the Authority can measure what is proposed for negotiation against specific statutory or regulatory provisions alleged to bar negotiations. See National Federation of Federal Employees, Local 1363 and Headquarters, U.S. Army Garrison, Yongsan, Korea, 4 FLRA 68 (1980), remanded as to other matters sub nom. Department of Defense, Department of the Army v. FLRA, 685 F.2d 641 (D.C. Cir. 1982).

B. Substantive Contentions

1. Waiver

The record in this case does not provide any basis for substantiating the Agency's assertion that the Union waived its right to bargain over the matter at issue in the parties' negotiated agreement. The Agency may, of course, pursue this question in the context of other appropriate proceedings. See American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 at 306 n. 6 (1984).

2. Compelling Need for Agency Regulation Under Section 7117(a)(2)

NAVSHIPYDPUGETNOTE 4650 contains Department of the Navy directions on travel administration which would require five specific changes in the Agency's existing practice. Travel advances would be limited to 80% of the estimated per diem and miscellaneous expense costs; advances for per diem/actual expense allowances would not made for one day trips (where travel commences and ends the same calendar day) but could be made on a case-by-case basis as long as the total to be advanced is more than $50; travel advances would not be paid earlier than three working days prior to commencement of travel; travel claim settlement vouchers would be required to be submitted to the Disbursing Officer within 10 calendar days after completion of travel; and travelers who receive overpayments of travel advances will be required to make repayment within 15 calendar days from the date of the Disbursing Officer's letter of notification.

Under the Union's proposal, travel advances would remain at the current limitation of 90% of the estimated per diem and miscellaneous expense costs; there would continue to be no limitation on advances for one day travel; travel advances would continue to be paid no earlier than 10 working days prior to commencement of travel; travel claim settlement vouchers would continue to be required to be submitted to the Disbursing Officer within 15 calendar days after the completion of travel; and travelers who receive overpayments of travel advances would continue to be required to make payments within 20 calendar days from the date of the Disbursing Officer's letter of notification.

It is well established that when an Agency alleges a proposal is nonnegotiable because it conflicts with an Agency regulation for which a compelling need is claimed to exist under section 7117(a)(2), the Agency bears the burden of supporting such allegation. American Federation of Government Employees, AFL-CIO, Local 1928 and Department of the Navy, Naval Air Development Center, Warminster, Pennsylvania, 2 FLRA 450 (1980). We find that the Agency in this case has failed to demonstrate that a compelling need exists for the regulation raised as a bar to negotiations.

The Agency's compelling need contention is based on its arguments that: (1) its regulation is essential, as distinguished from helpful or desirable, to the accomplishment of its mission or the execution of its functions in a manner which is consistent with the requirements of an effective Government; and (2) the regulation implements a mandate under law or outside authority which is essentially nondiscretionary in nature. See section 2424.11(a) and (c) of the Authority's Rules. In support of its position that the regulation is essential, as distinguished from helpful or desirable, to achieving certain purposes, the Agency argues only that its regulation would result in a reduction of the frequency of overpayments of travel advances, thereby saving the Agency both time and money associated with the collection of overpayments. Even assuming that the regulation would have the effect claimed by the Agency, it has not demonstrated that its regulation is essential, as distinguished from merely helpful or desirable, to achieving its objective of reducing the costs associated with the collection of overpayments of travel advances. It does not indicate how this objective could not be achieved through any means other than this regulation, such as, for example, more accurate travel estimates. In failing to demonstrate that, in the absence of its regulation, the Agency would be unable to save the time and money associated with travel advance overpayments, it must be concluded that the Agency has not met its burden of showing that its regulation is essential to the accomplishment of that objective. See, for example, American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, Chicago Region, Illinois, 7 FLRA 217, 220 (1981).

As to its contention that its regulation implements a mandate under law or outside authority which is essentially nondiscretionary in nature, the Agency provides no persuasive evidence to support a finding of compelling need. Rather, it merely asserts that Congress and the Office of Management and Budget have "mandated" improvements in the administration of travel. The Agency does not establish that if such a mandate exists, the manner of its implementation is essentially nondiscretionary in nature. See, for example, National Treasury Employees Union, Chapter 26 and Internal Revenue Service, Atlanta District, 22 FLRA No. 30 (1986) (Union Proposals 3 and 4).

V. Conclusion

For the reasons and cases cited in the foregoing analysis, we find no merit in the Agency's contention that the Union's petition is deficient, or in its claim that a compelling need exists for its regulation, under section 7117(a)(2), so as to bar negotiations concerning the Union's proposal. Moreover, insofar as the Agency believes that the Union has waived its right to bargain over the matter at issue in this case, it may pursue that matter in the context of other appropriate proceedings. Therefore, the Union's proposal is within the duty to bargain.

VI. Order

Pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning the Union's Proposal.*/

Issued, Washington, D.C., November 21, 1986.

J. L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ In finding this proposal to be within the duty to bargain, the Authority makes no judgment as to its merits.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL BORDER PATROL COUNCIL,
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Union

and

Case No. O-NG-664
23 FLRA No. 11

and

Case No. O-NG-682
23 FLRA No. 17

DEPARTMENT OF JUSTICE,
IMMIGRATION AND
NATURALIZATION SERVICE

Agency

ORDER DENYING MOTION FOR RECONSIDERATION

This matter is before the Authority because of the Agency's request for reconsideration of the Authority's Decisions and Orders on Negotiability Issues of August 13 and 14, 1986, in the above-entitled matters.*/ The Union filed an opposition.

In the decision in 23 FLRA No. 11, the Authority rejected the Agency's procedural arguments that a proposal concerning the calculation of administratively uncontrollable overtime (AUO) for employees engaged in collective bargaining negotiations exceeded the scope of impact and implementation bargaining, and that negotiations over the proposal were inappropriate due to a claimed pending question concerning representation (QCR). Contrary to the Agency's substantive claims, the Authority held that: The proposal did not conflict with 5 C.F.R. § 550.151-.164; no compelling need existed for an Agency regulation, DOJ Order 1551.4a, asserted as a bar to negotiations; and, the proposal was not inconsistent with section 7131(a) of the Statute.

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*/ In 23 FLRA No. 17 the Agency seeks reconsideration of the Authority's Decision and Order on proposal 1 only.

With respect to Union Proposal 1 in 23 FLRA No. 17, the Authority rejected the Agency's procedural argument that a negotiability determination was inappropriate since the Union had not complied with section 2424.5 of the Authority's Rules and Regulations. Additionally, as to any disagreement the parties may have regarding the scope of a party settlement agreement, or the scope of impact and implementation bargaining, the Authority concluded that such factual issues are appropriately resolved in proceedings other than the negotiability appeal. As to substantive issues, the Authority held that Union Proposal 1, concerning the calculation of AUO payments for employees on details, did not conflict with 5 U.S.C. § 5545(c) or with 5 C.F.R. § 550.151-.164, was not an attempt to negotiate over rates of pay and that a compelling need did not exist for the Agency regulation asserted by the Agency as a bar to negotiations.

In its request for reconsideration of the two decisions, the Agency makes a number of procedural and substantive arguments. Specifically, as to its procedural arguments, the Agency claims that: 1) The Authority did not address in either decision the effect of the QCR stemming from a pending petition for exclusive recognition (RO); 2) the Authority's determination that the Union complied with section 2424.5 of the Authority Rules and Regulations in 23 FLRA No. 17 is inconsistent with the Authority's decision in U.S. Department of Justice, Immigration and Naturalization Service, and American Federation of Government Employees, Local 2724, 20 FLRA No. 86 (1985); and 3) the Authority is obligated under law to address all issues, factual as well as legal, arising in a negotiability appeal. As to 3, the Agency further states that, in any case, the questions raised in 23 FLRA No. 17 concerning the scope of the duty to bargain under a settlement agreement and in the context of impact and implementation bargaining, involve legal, not factual issues, and thus, should have been addressed.

First, contrary to the Agency's claim that the Authority did not address the QCR raised by the RO petition in either decision, we note that the QCR was resolved and thus, no longer pending, prior to the issuance of either of the two decisions. In any event, the Authority specifically stated in 23 FLRA No. 11 that the question of how an employee's participation in a particular set of negotiations will affect that employee's future eligibility for premium pay is appropriately within the scope of ground rules for those negotiations pursuant to the agreement between the parties in settlement of an unfair labor practice charge. Second, the Agency's claim that the Authority misapplied our precedent to find that the Union properly complied with section 2424.5 of the rules in 23 FLRA No. 17 is without merit. The case relied upon by the Agency is inapposite. It involved an interpretation of section 7116(d) of the Statute which precludes matters being raised under both the ULP procedures of the Statute and under a negotiated grievance procedure. Section 2424.5 of the Authority's rules at issue in this case does not preclude a matter from being raised under both the negotiability and ULP procedures but only provides that the Authority will not ordinarily process the issue under both procedures simultaneously. Third and finally, the Agency's last procedural argument constitutes nothing more than a disagreement with the Authority's determination that the questions concerning the scope of the duty to bargain raised in 23 FLRA No. 17 involve, in addition to possible legal issues, factual determinations which, under the Authority's holding in American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters, 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302 (1984), are to be resolved in other appropriate proceedings.

We turn now to the substantive arguments raised by the Agency in support of its request for reconsideration. Here the Agency argues, in essence, as follows: The Authority misinterpreted 5 U.S.C. § 5545(c) and 5 C.F.R. § 550.150-.164 governing the calculation of AUO; the proposals in both cases do constitute attempts to bargain over rates of pay in violation of law; there is a compelling need for the Agency's regulation to bar negotiation of both proposals; and the proposal in 23 FLRA No. 11 would violate section 7131(a) of the Statute and a decision of the Federal Labor Relations Council (FLRC) precluding payment of AUO for collective bargaining negotiations. The argument that the proposal in 23 FLRA No. 11 concerns bargaining over rates of pay merely constitutes an attempt to argue a matter not previously raised and will not be considered further. The remaining arguments raised by the Agency, including its reliance on a FLRC decision, in our view, simply constitute disagreements with the Authority's interpretation of the record and legal determinations that under applicable law, including the Statute, and Government-wide regulations the two proposals concerning the calculation period for AUO payments in specified circumstances were negotiable.

Consequently, under these circumstances, the Agency has not established any "extraordinary circumstances" within the meaning of section 2429.17 of the Rules and Regulations.

Accordingly, the Agency's request for reconsideration is denied.

Issued, Washington, D.C., November 10, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE LOGISTICS
COMMAND, WRIGHT-PATTERSON
AIR FORCE BASE, OHIO

Respondent

and Case No. 5-CA-40259

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 214, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Administrative Law Judge's Decision filed by the Respondent. The issue presented is whether the Respondent's failure and refusal to provide official time and travel and per diem expenses to employee Paul Palacio, who was subpoenaed by the General Counsel to appear in a related unfair labor practice hearing, constituted a failure to comply with section 7131(c) of the Federal Service Labor-Management Relations Statute (the Statute) and section 2429.13 of the Authority's Regulations in violation of section 7116(a)(1) and (8) of the Statute. In agreement with the Judge, we find that the Respondent's conduct violated the Statute.

II. Background

Prior to the unfair labor practice hearing in the related case (Case No. 5-CA-30322, Department of the Air Force, Headquarters Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 22 FLRA No. 56 (1986)), the Respondent informed employee Palacio that his request for official time and travel and per diem expenses related to his appearance as a subpoenaed witness in that case was denied. At the hearing in Case No. 5-CA-30322, Administrative Law Judge Chaitovitz denied Respondent's motion to revoke the subpoenas. Palacio traveled at his own expense and used annual leave for that portion of the hearing during which he was a witness. He has not been reimbursed by Respondent for these expenses, nor has the annual leave he used been restored.

III. Judge's Decision

The Administrative Law Judge in this case, Judge Oliver, concluded that the Respondent's denial of official time and its refusal to provide travel and per diem expenses to Palacio constituted a failure to comply with section 7131(c) of the Statute and section 2429.13 of the Authority's Regulations. He therefore found a violation of section 7116(a)(1) and (8).

In concluding that the Respondent's denial of official time constituted a failure to comply with section 7131(c) of the Statute, Judge Oliver noted that in Department of Health and Human Services, Social Security Administration, Great Lakes Program Service Center, 10 FLRA 510 (1982), the Authority held that once the participation of an employee has been deemed necessary by a designated agent of the Authority, the agency has no discretion to determine whether or not an employee should be on official time. Judge Oliver also pointed out that the Authority has held that an agency is required to provide official time in the amount determined by the Authority's designated agent, and has rejected arguments like those by Respondent that such a determination is subject to a "reasonableness" standard.

As to Judge Chaitovitz's denial in the related case of Respondent's motion to revoke the subpoenas, Judge Oliver noted that Judge Chaitovitz had the power, subject to Authority review, to determine whether Palacio's participation in the hearing was necessary. Judge Oliver stated that the Authority's regulations provide procedures whereby Judge Chaitovitz's ruling could be reviewed in that case. Accordingly, Judge Oliver concluded that Judge Chaitovitz's ruling could not be collaterally attacked in this case and that given the ruling by Judge Chaitovitz, "Respondent was obligated to provide Mr. Palacio with official time and follow the Authority procedures for review if it wished to challenge the Judge's decision."

With respect to Respondent's refusal to pay Palacio's travel and per diem expenses, Judge Oliver noted that the Authority's interpretation of section 7131(c) of the Statute was set forth in section 2429.13 of its Regulations, which provides that "necessary transportation and per diem expenses shall be paid by the employing activity or agency" for an employee on official time whose participation in an Authority proceeding is deemed necessary. The Judge found that, in view of section 2429.13 of the Regulations, Respondent failed to comply with section 7131(c) of the Statute by refusing to provide travel and per diem expenses to Palacio and thereby violated section 7116(a)(1) and (8) of the Statute, as alleged by the General Counsel.

IV. Positions of the Parties

The Respondent filed a motion with the Authority seeking consolidation of this case with the related unfair labor practice case noted above. The Respondent also filed exceptions to the Judge's Decision, specifically to the Judge's conclusion that under section 7131(c) of the Statute and section 2429.13 of the Regulations Palacio was entitled to travel and per diem expenses based on his entitlement to official time. The Respondent's exceptions essentially repeat arguments made to the Judge challenging the lawfulness of the Authority's Regulation. The Respondent also excepted to the Judge's recommended Order requiring that Palacio be provided with official time, contending that the validity of the subpoenas concerning Palacio had not yet been determined in the related case.

V. Analysis

A. Motion to Consolidate

For the reasons stated in Department of the Air Force, Headquarters Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 22 FLRA No. 56 (1986), the Authority denies the Respondent's motion to consolidate.

B. Official Time

In agreement with the Judge, we find that the Respondent's denial of official time to Palacio constituted a failure to comply with section 7131(c) of the Statute in violation of section 7116(a)(1) and (8) of the Statute. As the Judge noted, once Palacio's participation was deemed necessary by an agent of the Authority, Respondent was obligated to comply or to seek review in that proceeding as provided in the Authority's Regulations; no collateral attack is permitted. In fact, Respondent did seek review of that determination in Case No. 5-CA-30322, and the Authority denied Respondent's exception. Wright-Patterson Air Force Base, Ohio, 22 FLRA No. 56.

C. Travel and Per Diem Expenses

The Authority also adopts the Judge's conclusion that the Respondent's denial of travel and per diem expenses to Palacio related to his required participation in an unfair labor practice hearing constituted a failure to comply with section 7131(c) of the Statute as interpreted in section 2429.13 of the Authority's Regulations. Therefore, Respondent's denial violated section 7116(a)(1) and (8) of the Statute.

As noted above, Respondent in essence argues that section 2429.13 of our Regulations is not in accordance with law. We disagree.

In Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1983), the Supreme Court held that an agency's obligation under section 7131(a) of the Statute to provide official time to employees representing an exclusive representative in the negotiation of a collective bargaining agreement does not require the agency to pay travel and per diem expenses incurred by those employees. The Court noted that the Authority had previously construed section 7131(c) in its Regulations to require the payment of these expenses for employees on official time participating in proceedings before the Authority, and the Court stated: "We, of course, express no view as to whether different considerations uniquely applicable to proceedings before the Authority might justify the FLRA's interpretation of section 7131(c)." BATF v. FLRA, 464 U.S. at 99 n.9. In our view, our interpretation of section 7131(c) as set forth in section 2429.13 of the Regulations is warranted for the reasons discussed below.

Section 7131(c) of the Statute provides that "the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status." Pursuant to its authority under section 7134 of the Statute to prescribe regulations to carry out the provisions of the Statute, and consistent with its responsibilities under section 7105 of the Statute, the Authority promulgated section 2429.13 of its Regulations as an interim regulation in 1979 which became final in 1980. See 44 Fed. Reg. 44740, 44771 (1979) and 45 Fed. Reg. 3482 (1980).

Section 2429.13 was a continuation of the practice established by the Assistant Secretary of Labor for Labor-Management Relations for the conduct of hearings under Executive Order 11491, as amended. That practice was reflected in 29 CFR § 206.7(g), which was promulgated in 1973 and provided that employees who had been determined to be necessary as witnesses at a hearing shall be granted official time and "[i]n addition, necessary transportation and travel and per diem expenses shall be paid by the employing activity or agency." See 38 Fed. Reg. 30875 (1973). That regulation was in effect throughout the remainder of the Executive Order program. Presumably, Congress was aware of this practice when it enacted the Statute; however, unlike in some other areas, there is no indication in the legislative history of any Congressional intent to change this practice.

Moreover, section 2429.13 assists in enabling the Authority to develop complete records in proceedings before it so that the Authority may carry out its responsibilities under the Statute. The regulation assures employees whose participation in a proceeding is deemed necessary by an Authority agent that they may testify without concern over whether authorization for necessary travel and per diem expenses will be granted by their employing agency. It also serves to expedite the process by avoiding unnecessary procedural delays.

Finally, our practice as set forth in section 2429.13 is consistent with that of other Federal agencies having analogous responsibilities to adjudicate matters involving federal employees. See, for example, In re Maisto, 28 MSPR 436 (1985) (Merit Systems Protection Board ordered agency, pursuant to 5 C.F.R. § 1201.33, to compensate employee who testified at Board hearing for the time spent in transit to and from the hearing and any time spent waiting to testify "as well as for expenses incurred by the actual transportation to and from the hearing.").

Accordingly, in our view, section 2429.13 of the Authority's Regulations is in accordance with law.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms these rulings. The Authority has considered the Judge's Decision and the entire record in this case, and adopts the Judge's findings, conclusions and recommended Order to the extent that they are consistent with our decision.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio shall:

1. Cease and desist from:

(a) Denying official time, transportation, and per diem expenses to an employee to participate in a hearing before the Federal Labor Relations Authority when such participation has been deemed necessary by any Administrative Law Judge, Regional Director, or other designated agent of the Authority.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute.

(a) Provide official time to Paul Palacio for his participation in an unfair labor practice hearing before the Authority in Case No. 5-CA-30322 from March 12 through March 14, 1984, and make him whole for annual leave used for the purpose; and, in addition, upon submission of a properly documented voucher, reimburse him for transportation and per diem expenses incurred.

(b) Post at its facilities at Wright-Patterson Air Force Base and Kelly Air Force Base copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, Air Force Logistics Command, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region V, Federal Labor Relations Authority in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., November 26, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT deny official time to an employee to participate in a hearing before the Federal Labor Relations Authority when such participation has been deemed necessary by any Administrative Law Judge, Regional Director, or other designated agent of the Authority.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL provide official time to Paul Palacio for his participation in an unfair labor practice hearing before the Authority in Case No. 5-CA-30322 from March 12 through March 14, 1984, and make him whole for annual leave used for that purpose; and, in addition, upon submission of a properly documented voucher, reimburse him for transportation and per diem expenses incurred.

____
(Activity)

Dated: ____________________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region V, Federal Labor Relations Authority whose address is: 175 West Jackson Boulevard, Suite 1359-A, Chicago, Illinois 60604 and whose telephone number is: (312) 353-6306.

(24 FLRA No. 26)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

DEPARTMENT OF THE AIR FORCE,
HEADQUARTERS, AIR FORCE LOGISTICS
COMMAND, WRIGHT-PATTERSON AIR
FORCE BASE, OHIO

Respondent

and   Case No.: 5-CA-40259

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 214, AFL-CIO

Charging Party

Major Charles L. Brower, Esquire
Major W. Kirk Underwood, Esquire
For the Respondent

Mr. Paul Palacio
For the Charging Party

Sandra LeBold, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns an unfair labor practice complaint issued by the Regional Director, Region Five, Federal Labor Relations Authority, Chicago, Illinois, against the Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio (Respondent) based on an amended charge filed by the American Federation of Government Employees, Council 214, AFL-CIO (Charging Party or Union). The complaint alleged, in substance, that Respondent violated sections 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq. (the Statute), by failing and refusing to comply with section 7131(c) of the Statute and section 2429.13 of the Authority's Rules and Regulations. More specifically, the complaint alleges that Respondent failed and refused to provide official time, travel, and per diem expenses to Respondent's employee, Paul Palacio, to participate in an unfair labor practice hearing before the Authority in Case No. 5-CA-30322, as requested and deemed necessary by a Regional Director of the Authority. The complaint also alleges that Respondent violated section 7116(a)(1) and (8) by each of the alleged acts.

Respondent's answer admitted the jurisdictional allegations as to the Respondent, Charging Party, and the charge, but denied any violation of the Statute.

A hearing was held in Dayton, Ohio. The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Respondent and the General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

1. The American Federation of Government Employees, AFL-CIO (AFGE) is the collective bargaining representative of a consolidated appropriate unit of Respondent's employees located at, among other places, Wright-Patterson Air Force Base (AFB), Dayton, Ohio; Hill AFB, Ogden, Utah; Robins AFB, Warner Robins, Georgia; McClellan AFB, Sacramento, California; Kelly AFB, San Antonio, Texas; and Tinker AFB, Oklahoma City, Oklahoma.

2. At all times material herein the Charging Party, AFGE, Council 214, has been an agent of AFGE with respect to bargaining with Respondent on behalf of the collective bargaining unit.

3. At all times material, Paul Palacio has been, and is now, president of the Charging Party. As president, Mr. Palacio is assigned to Wright-Patterson AFB in Dayton, Ohio, where Headquarters, Air Force Logistics Command (AFLC) is located, although technically Palacio is assigned to Kelly AFB as a machine tool operator. Section 4.12 of the Master Labor Agreement between Respondent and the Charging Party authorizes one Union representative to be on 100% official time at Headquarters, AFLC. Palacio is now, and has been at various times, that representative, as more fully explained herein.

4. On February 1, 1984, the Regional Director, Federal Labor Relations Authority, Chicago Region, Chicago, Illinois issued a subpena to Palacio at the request of Judith Ramey, Counsel for the General Counsel, FLRA, requiring that he appear before an Administrative Law Judge on March 12, 1984 at the Murray Federal Building, Oklahoma City, Oklahoma to testify in the matter of Department of the Air Force, Headquarters AFLC, Wright-Patterson Air Force Base, Ohio (Respondent) and American Federation of Government Employees, Council 214, (Charging Party), Case No. 5-CA-30322, involving the same parties as the instant case. The subpena stated on its face:

> NOTICE TO WITNESS - Witness fees and mileage shall be paid by the party at whose instance the witness appears, except that any witness who is employed by the Federal Government shall be granted official time and be paid necessary transportation and per diem expenses by the employing activity or agency.

5. The complaint in Case No. 5-CA-30322 alleged that on or about the month of February 1983, 63 supervisors, each named in the complaint, established and/or implemented a quota system for rating employees under the civilian potential appraisal system under which system supervisors rated employees in accordance with established numeric quotas for the distribution of rating scores; that the use of quotas constituted a change in conditions of employment; and that Respondent did not give the Union notice and opportunity to bargain about the impact and implementation of such change in violation of section 7116(a)(1) and (5) of the Statute. Eleven of the 63 supervisors were assigned to Wright-Patterson AFB, Ohio; 16 to Hill AFB, Utah; 6 to Robins AFB, Georgia; 11 to McClellan AFB, California; 3 to Kelly AFB, Texas, and 16 to Tinker AFB, Oklahoma. The complaint did not allege that these quotas were implemented in accordance with a command-wide policy. The Regional Director ordered the case to be heard at Dayton, Ohio.

6. Due to the large number of geographically dispersed witnesses in Case No. 5-CA-30322, the Administrative Law Judge assigned to hear the case, Samuel A. Chaitovitz, ruled that the hearing would be held in three locations: Dayton, Ohio, Oklahoma City, Oklahoma and Macon, Georgia. Mr. Palacio was also subpenaed to appear on February 8, 1984 in Dayton, Ohio and April 11, 1984 in Macon, Georgia.[1]

7. On February 6, 1984, Palacio sent a copy of his three subpenas to General James P. Mullins and requested official time, travel and per diem expenses in order to comply with the subpenas.

8. On February 8, 1984, the first phase of the hearing opened in Dayton, Ohio. Major Charles Brower, counsel for the Respondent, moved that Administrative Law Judge Chaitovitz revoke Palacio's subpenas for the Oklahoma City and Macon phases of the hearing on the grounds that his testimony was not relevant to the proceeding at those locations. The motion was argued, and Administrative Law Judge Chaitovitz questioned counsel, as well as Mr. Palacio, who was representing the Charging Party, concerning the necessity for Palacio's testimony in Oklahoma City and

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[1] The Macon subpena was subsequently revoked by the General Counsel. Mr. Palacio was not present for the Macon phase of the hearing either as a witness or as representative of the Charging Party.

Macon.[2] When asked by Judge Chaitovitz, "Why is he necessary?," Ms. Ramey, Counsel for the General Counsel, replied,

> . . .[T]he General Counsel does not know all of what testimony will be presented by Respondent at the other locations [Oklahoma City and Macon]. There are witnesses on the tentative witness list who have not been discussed and who even Respondent's counsel has indicated he wasn't sure what their testimony might be because they had been recommended to him as witnesses . . . by counsel at the other bases. Consequently, . . . since I don't know what rebuttal might be needed, I at least need to have Mr. Palacio present as somebody who might possibly be able to rebut that testimony. The General Counsel deems him to be a necessary witness and the Regional Director has issued the necessary subpoenas.

Judge Chaitovitz also ascertained from Mr. Palacio that he had been the person who had been dealing with management generally on the problem and was the person who received complaints from the various regional and field representatives. Respondent's counsel countered that Mr. Palacio possessed only hearsay knowledge of what had happened at the other locations and that local union presidents at the other locations "can satisfy any role that she thinks Mr. Palacio might be able to serve her if he were at her side at these various locations." After hearing argument, Judge Chaitovitz denied the motion to revoke, ruling as follows:

> . . . I recognize that in deciding whether a witness is necessary, I am not to superimpose my judgment for that of counsel trying a case. That counsel may have another witness that may or may not serve the same purpose. I don't think if a witness is reasonably related that I can say, "No, I'm going to make you use someone else." I don't think my authority goes that far. I am not going to revoke the subpoena, but I will permit the subpoena to stand, because I think that Mr. Palacio is -- may reasonably be expected to have relevant information that can be admissible with respect to what happened at these other bases.

9. During the Dayton phase of the hearing on February 8, 1984, Mr. Palacio testified during General Counsel's presentation of its case-in-

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[2] At the same time, Judge Chaitovitz denied a motion filed by Palacio that Respondent pay his travel and per diem expenses in Oklahoma City and Macon to act as the Charging Party's representative. Palacio represented the Charging Party in Dayton and Oklahoma City. The Charging Party did not enter an appearance in Macon.

chief. He received, or, under the contract continued on, official time. No travel and per diem expenses were required for Palacio since he lives in Dayton.

10. By letter dated March 1, 1984, Respondent informed Palacio, in response to his February 6, 1984 request, that travel and per diem expenses would not be provided by Respondent.

11. By letter to Respondent dated March 6, 1984 Palacio repeated his request for official time and travel and per diem expenses in order to comply with the subpenas.

12. On March 8, 1984 Respondent reiterated its position that payment of Palacio's travel expenses for the hearing in Oklahoma City and Macon was not appropriate from Air Force funds. Respondent claimed participation "is both redundant and irrelevant." Respondent noted that Palacio had already testified during the Dayton phase of the case, that he had been subpoenaed as a mere "potential rebuttal" witness, and that his "potential rebuttal" testimony would be "nothing more than hearsay evidence having little or no probative value." Respondent also stated that the Oklahoma City phase was scheduled to last two weeks (March 12-23, 1984), and Mr. Palacio would not be needed as a potential rebuttal witness until late in that 2-week period. Respondent noted that Mr. Palacio was already scheduled to be on official time in Oklahoma City beginning March 16, 1984 for several days in connection with contract negotiations. Respondent stated it would have no objection to his taking official time during that particular period in order to provide the testimony.

13. On March 9, 1984, Palacio sent a copy of his Oklahoma City subpena to E. Villanueva, his supervisor at Kelly AFB, Texas and requested approval of official time to attend the hearing as directed by the subpena.[3] In the alternative, Mr. Palacio requested annual leave to attend the hearing, but made it clear that this request was made under protest. The Respondent answered Mr. Palacio in a letter dated March 16, 1984, denying him official time but approving his annual leave request.

14. Palacio traveled to Oklahoma City, Oklahoma from Dayton, Ohio and testified at the hearing, which took place from March 12 through March 14, 1984.[4] Palacio was called during the merits of the Kelly AFB case. He

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[3] Due to the fact that Palacio was under subpena and required to leave Wright-Patterson AFB, he had delegated his position as the Union representative at Headquarters, AFLC, to another Union official and, *therefore, was no longer on 100% official time.*

[4] Although it was originally anticipated that the hearing would take two weeks, the time was drastically reduced due to various stipulations and the General Counsel's withdrawal of allegations against 12 of the 31 supervisors named from Tinker, Kelly, and Hill AFBs.

was asked two questions. He apparently remained until the end of the hearing at the request of the General Counsel. Palacio did not testify as a rebuttal witness. Palacio used annual leave during this period and was not reimbursed by Respondent for his transportation and per diem expenses.5/

Discussion, Conclusions, and Recommendations

Position of the parties

The complaint alleges that Respondent failed to comply with section 7131(c) of the Statute6/ and section 2429.13 of the Authority's Rules and Regulations7/ by refusing to provide official time, travel, and per diem expenses to Respondent's employee, Paul Palacio, to participate in an unfair labor practice hearing, as requested and deemed necessary by the

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5/ Palacio was on official time from March 16, 1984 to April 26, 1984 as chief negotiator for the Union during the negotiations of the master labor agreement at Tinker Air Force Base, Oklahoma.

6/ Section 7131(c) provides:

> (c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

7/ Sections 2429.13 provides:

> § 2429.13 Official time.
>
> If the participation of any employee in any phase of any proceeding before the Authority, including the investigation of unfair labor practice charges and representation petitions and the participation in hearings and representation elections, is deemed necessary by the Authority, the General Counsel, any Administrative Law Judge, Regional Director, Hearing Officer, or other agent of the Authority designated by the Authority, such employee shall be granted official time for such participation, including necessary travel time, as occurs during the employee's regular work hours and when the employee would otherwise be in a work or paid leave status. In addition, necessary transportation and per diem expenses shall be paid by the employing activity or agency.

Regional Director of the Authority, thus violating sections 7116(a)(1) and (8) of the Statute.[8]

With respect to official time, Respondent defends on the grounds that Judge Chaitovitz abused his discretion when he determined that Palacio was a necessary witness. Respondent claims that the General Counsel's basis for subpenaing Palacio was incredibly vague; Mr. Palacio possessed only hearsay knowledge of the allegations to be litigated; local Union officials at Oklahoma City and Macon were available as witnesses and just as suitable; and Mr. Palacio had already testified during the Dayton phase with regard to all of his first-hand knowledge. Respondent contends that even if Judge Chaitovitz properly determined that Mr. Palacio was a "necessary" witness, that determination should be subject to the application of a "reasonableness test."

The General Counsel maintains that the need for Mr. Palacio's participation as a witness was made by the General Counsel prior to the time the hearing had been convened; that Respondent was, therefore, obligated to provide Palacio official time, travel, and per diem according to Authority decisions; the General Counsel's determination was not subject to a "reasonableness" standard; and if Respondent disagreed with Judge Chaitovitz's ruling on its motion to revoke Palacio's subpena, it must obtain review of that decision by filing exceptions in that case and may not litigate the matter in this unfair labor practice proceeding.

Official Time

As noted, section 7131(c) of the Statute empowers the Authority to make determinations as to whether employees participating in proceedings before it shall be authorized official time.

In this case the Regional Director, prior to the hearing, determined that Palacio's participation as a witness in the hearing was necessary by issuing a subpena at the request of counsel for the General Counsel. Under section 7104(f)(2)(B) of the Statute the General Counsel is empowered to "file and prosecute complaints" and such express authority necessarily encompasses the manner in which the complaints are to be prosecuted.

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[8] Section 7116(a)(1) and (8) provides:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency -
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> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> . . . .
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

The Authority has held that once the participation of an employee has been deemed necessary by a designated agent of the Authority, there is no discretion in the agency to determine whether or not an employee should be on official time. Department of Health and Human Services, Social Security Administration, Great Lakes Program Service Center, 10 FLRA 510, 512 (1982). The Authority has also held that an agency is required to provide official time in the amount requested by the designated agent of the Authority and it has rejected recommended decisions which would have applied a "reasonableness" standard to the request. Department of the Treasury, Internal Revenue Service, 15 FLRA No. 108, 15 FLRA 506 (1984); Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 13 FLRA No. 94, 13 FLRA 558 (1983); Department of Health and Human Services, Social Security Administration Great Lakes Program Service Center, 10 FLRA No. 90, 10 FLRA 510 (1982).

The Authority has held that "once an unfair labor practice hearing has convened and before the close of the hearing, . . . the Administrative Law Judge has the power under the Authority's Rules and Regulations to determine, subject to review by the Authority, whether the participation of any employee in any proceeding before the Authority is necessary. . . ." Norfolk Naval Shipyard, Portsmouth, Virginia, 5 FLRA No. 105, 5 FLRA 788 (1981). At the outset of the hearing in Case No. 5-CA-30322, Judge Chaitovitz heard argument as to whether Mr. Palacio was a necessary witness in connection with Respondent's motion to revoke Palacio's subpenas. Judge Chaitovitz denied to motion to revoke. The Authority's Rules and Regulations, section 2423.26-29 and 2429.7(e), provide the procedures whereby his ruling may be reviewed in that case. His ruling may not be collaterally attacked here as an abuse of discretion. Given the ruling by the Administrative Law Judge, Respondent was obligated to provide Mr. Palacio with official time and follow the Authority procedures for review if it wished to challenge the Judge's decision.

The Respondent's denial of official time to Mr. Palacio constitutes a failure to comply with section 7131(c) in violation of section 7116(a)(1) and (8) of the Statute, as alleged.

Travel and Per Diem Expenses

With respect to transportation and per diem expenses, the Respondent asserts that section 7131(c) of the Statute does not require an agency to pay an employee transportation or per diem expenses; 5 C.F.R. § 2429.13 is not in accordance with law; entitlement to such expenses is governed solely by 5 U.S.C. § 5751 and § 5702; 5 C.F.R. § 2429.13 constitutes and unauthorized assumption by the FLRA of a major policy decision properly made by Congress; and, even if 5 C.F.R. § 2429.13 is given effect, Judge Chaitovitz abused his discretion when he determined that Palacio was a necessary witness and that determination should have been subject to a "reasonableness" test.

As noted, section 7131(c) of the Statute empowers the Authority to make determinations as to whether employees participating in proceedings before it shall be authorized official time. Section 7131(c) says nothing about transportation or per diem expenses. The Authority, however, in Interpretation and Guidance, 2 FLRA 265, 270 (1979), in connection with the interpretation of section 7131(a), noted that it had previously interpreted section 7131(c), in section 2429.13 of its Regulations, as entitling the employee on such official time to transportation and per diem expenses. See also U.S. Department of Justice, Federal Prison System, 10 FLRA 662 (1982); Department of Health and Human Services, Social Security Administration, Great Lakes Program Service Center, 10 FLRA 510 (1982; Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 10 FLRA 10 (1982).

In Bureau of Alcohol, Tobacco and Firearms v. FLRA, 114 LRRM 3393, 3399, 104 S. Ct. 439 (1983), the Supreme Court concluded that the obligation of an agency under section 7131(a) of the Statute to provide official time to employees representing an exclusive representative in the negotiation of a collective bargaining agreement does not encompass the payment of travel expenses and per diem allowances. The Court explicitly stated that there is no reference in the Statute or its legislative history to travel expenses and per diem allowances. 114 LRRM at 3399. The Supreme Court noted that the Authority had previously construed section 7131(c) in its regulations to require the payment of travel expenses and per diem expenses. The Court stated, "The fact that the Authority interpreted two similar provisions of the Act consistently does not, however, demonstrate that either interpretation is correct. We, of course, express no view as to whether different considerations uniquely applicable to proceedings before the Authority might justify the FLRA's interpretation of § 7131(c)." 114 LRRM at 3397, n. 9.

The Authority's regulations remain unchanged, and I am bound by its interpretation of section 7131(c). Respondent's arguments that 5 C.F.R. § 2429.13 is not in accordance with law and constitutes an unauthorized assumption by the FLRA of a major policy decision properly made by Congress are more properly addressed by the Authority and the courts. Respondent's position that Judge Chaitovitz abused his discretion when he determined that Palacio was a necessary witness and that determination should have been subject to a "reasonableness" test are without merit for the reasons set out above. The Authority has specifically rejected a "reasonableness test," and Respondent may properly obtain review of Judge Chaitovitz's exercise of discretion in Case No. 5-CA-30322.

It is noted that Palacio's participation as a witness subpenaed at the request of the General Counsel also brought into operation section 2429.14 of the regulations which also references section 2429.13. Section 2429.14 provides as follows:

> § 2429.14 Witness fees.
> (a) Witnesses (whether appearing voluntarily, or under a subpena) shall be paid the fee and mileage

> allowances which are paid subpenaed witnesses in the courts of the United States: Provided, That any witness who is employed by the Federal Government shall not be entitled to receive witness fees in addition to compensation received pursuant to § 2429.13.

The statutory basis for section 2429.14 of the Regulations is section 7132 of the Statute[9/] which authorizes the Authority and its designees to issue subpenas requiring the attendance and testimony of witnesses. It provides that "(c) Witnesses (whether appearing voluntarily or under subpena) shall be paid the same fee and mileage allowances which are paid subpenaed witnesses in the courts of the United States." 28 U.S.C. § 1821 governs the payment of fees, per diem, and mileage to witnesses in the courts of the United States. In general, witness fees and mileage are paid by the party at whose instance the witness appears, subject to the court's discretion to assess such expenses against a party as part of the taxable costs of the suit. With regard to witnesses who are employees of the United States, however, 5 U.S.C. § 5751 specifically provides the procedure for the payment of the travel expenses of a witness who is summoned to testify on behalf of the United States, or to testify in his official capacity or produce records on behalf of a party other than the United States.[10/] 5 U.S.C. §5751(a) provides as follows:

[9/] Section 7132 provides, in relevant part:

> (a) Any member of the Authority, the General Counsel, or the Panel, any administrative law judge appointed by the Authority under section 3105 of this title, and any employee of the Authority designated by the Authority may--
>
> (1) issue subpenas requiring the attendance and testimony of witnesses and the production of documentary or other evidence from any place in the United States[.]
>
> . . . .
>
> (c) Witnesses (whether appearing voluntarily or under subpena) shall be paid the same fee and mileage allowances which are paid subpenaed witnesses in the courts of the United States.

[10/] 5 U.S.C. § 6322 provides that an employee summoned, or assigned by his agency, to testify on behalf of the United States, or to testify in his official capacity for a party other than the United States "is performing official duty during the period. . . ." See also 5 C.F.R. § 1201.33 (1984), which provides that Federal employee witnesses testifying before the Merit Systems Protection Board at the request of the presiding officer are in official duty status.

§ 5751. Travel expenses of witnesses

> **(a) Under such regulations as the Attorney General may prescribe an employee as defined by section 205 of this title (except an individual whose pay is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives) summoned, or assigned by his agency, to testify or produce official records on behalf of the United States is entitled to travel expenses under subchapter I of this chapter. If the case involves the activity in connection with which he is employed, the travel expenses are paid from the appropriation otherwise available for travel expenses of the employee under proper certification by a certifying official of the agency concerned. If the case does not involve its activity, the employing agency may advance or pay the travel expenses of the employee, and later obtain reimbursement from the agency properly chargeable with the travel expenses.**

The implementing regulations of the Attorney General are contained in 28 C.F.R. Part 21 (1984) and provide, in part, that an employee qualifying for the payment of travel expenses shall be paid at the rate and in the amounts allowable for other purposes under the provisions of 5 U.S.C. § 5701-5708.[11] See 28 C.F.R. § 21.1(c) (1984).

In order for the employing agency to be chargeable for the employee's travel expenses under section 5751(a), it must be found that the employee was "summoned, or assigned by his agency to testify . . . on behalf of the United States" and "the case involves the activity in connection with which he is employed." Cf. B-160120, 46 Comp. Gen. 613 (1967). It is unnecessary to determine whether section 5751(a) would apply in this instance as the complaint does not allege a specific violation of section 7132(c) of the Statute and the General Counsel has made no contention that Respondent was obligated to pay Palacio's travel expenses pursuant to 5 U.S.C. § 5751(a) or any other provision of law other than section 7131(c).

Since the Authority has ruled that the obligation of an agency under section 7131(c) of the Statute encompasses the payment of travel expenses and per diem allowances, I am constrained to conclude that the Respondent failed to comply with section 7131(c) by its refusal to provide travel and per diem expenses to the employee and thereby violated § 7116(a)(1) and (8) of the Statute, as alleged.

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[11] 5 U.S.C. §§5702-5708 relate to the payment and administration of travel expenses and per diem allowances for employees acting in an official capacity.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that the Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio shall:

1. Cease and desist from:

(a) Denying official time, transportation, and per diem expenses to an employee to participate in a hearing before the Federal Labor Relations Authority when such participation has been deemed necessary by any Administrative Law Judge, Regional Director, or other designated agent of the Authority.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute.

(a) Provide official time to Paul Palacio for his participation in an unfair labor practice hearing before the Authority in Case No. 5-CA-30322 from March 12 through March 14, 1984, and make him whole for annual leave utilized for that purpose; and, in addition, upon submission of a properly documented voucher, reimburse him for transportation and per diem expenses incurred.

(b) Post at its facilities at Wright-Patterson Air Force Base and Kelly Air Force Base copies of the attached Notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by an authorized official and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Respondent shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to 5 C.F.R. section 2423.30 notify the Regional Director, Region Five, Federal Labor Relations Authority, Chicago, Illinois, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

GARVIN LEE OLIVER
Administrative Law Judge

Dated: February 27, 1985
Washington, DC

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

We Hereby Notify Our Employees That:

WE WILL NOT deny official time to an employee to participate in a hearing before the Federal Labor Relations Authority when such participation has been deemed necessary by any Administrative Law Judge, Regional Director, or other designated agent of the Authority.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL provide official time to Paul Palacio for his participation in an unfair labor practice hearing before the Authority in Case No. 5-CA-30322 from March 12 through March 14, 1984, and make him whole for annual leave utilized for that purpose; and, in addition, upon submission of a properly documented voucher, reimburse him for transportation and per diem expenses incurred.

____
(Agency or Activity)

Dated: ________________ By: ________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region Five, whose address is: 175 West Jackson Boulevard, Suite 1359-A, Chicago, Illinois 60604 and whose telephone number is: (312) 353-6306.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE NAVY
PORTSMOUTH NAVAL SHIPYARD
PORTSMOUTH, NEW HAMPSHIRE

Respondent

and Case No. 1-CA-40290

FEDERAL EMPLOYEES METAL TRADES
COUNCIL, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the Respondent (Agency). The General Counsel filed an opposition to the exceptions. The issue is whether it is an unfair labor practice under the Federal Service Labor-Management Relations Statute (the Statute) for the Respondent to refuse a request, made pursuant to section 7114(b)(4) of the Statute, to provide the Charging Party (Union) with the names and home addresses of employees in a bargaining unit which the Union exclusively represents.

In a recent Decision and Order on Remand, Farmers Home Administration Finance Office, St. Louis, Missouri, 23 FLRA No. 101 (1986) (FHAFO), we reviewed the Authority's previous decision concerning the release of the names and home addresses of bargaining unit employees to exclusive representatives. We concluded that the release of the information is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets all of the other requirements established by section 7114(b)(4). We also determined that the release of the information is generally required without regard to whether alternative means of communication are available. Consistent with our decision on remand in FHAFO, we conclude that

Respondent's refusal to provide the Union with the names and home addresses sought in this case violated section 7116(a)(1), (5) and (8) of the Statute.

II. Facts

The Union requested the names and home addresses of the unit employees it represents. The Respondent denied the request on the ground that the information sought was not available under the Statute or the parties' negotiated agreement. The Respondent also contended that the information was not subject to disclosure under the provisions of the Privacy Act.[1]

III. Administrative Law Judge's Decision

The Judge concluded that the Respondent failed to comply with the requirements of section 7114(b)(4) of the Statute in violation of section 7116(a)(1), (5) and (8) of the Statute when it refused to provide the Union, upon request, with the names and home addresses of all unit employees represented by the exclusive representative. In reaching this conclusion, the Judge found that the home addresses were necessary and relevant within the meaning of section 7114(b)(4) of the Statute for the Union to carry out its representational obligations; that the alternative means of communicating with unit employees which were available to the Union were not effective; that the disclosure of home addresses was not prohibited by law or regulation; and that the Union's need for home addresses in order to effectively communicate with the employees it represents outweighed the minimal intrusion on employee privacy rights which would result.

IV. Positions of the Parties

The positions of the parties are set forth in the Respondent's exceptions and the General Counsel's opposition.[2]

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[1] Privacy Act of 1974, 5 U.S.C. § 552a (1982).

[2] When the Authority decided, for reasons discussed more fully in FHAFO, to review the entire issue of the release of employees' names and home addresses and invited agencies, unions, and interested persons to submit *amicus* briefs addressing the issue, this case was one of those listed as being under consideration. While the parties in this case did not submit *amicus* briefs, the Department of the Navy and the Metal Trades Department of the AFL-CIO did file *amicus* briefs outlining their positions.

In its exceptions, the Respondent essentially disagrees with the Judge's findings and conclusions and asserts that it was not obligated to furnish the requested information to the Union.

In its opposition, the General Counsel argues that the Judge's findings and conclusions are supported by a preponderance of the evidence and are consistent with law. The General Counsel therefore urges the Authority to adopt the Judge's decision in its entirety.

V. Analysis and Conclusion

As noted above, the Authority in the decision on remand in FHAFO concluded that the release of home addresses of bargaining unit employees to the exclusive representatives of these employees is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets the other requirements of section 7114(b)(4). We also determined that agencies are required to furnish such information without regard to whether alternative means of communication are available. Based on our decision on remand in the FHAFO case and in agreement with the Judge in this case, we find that the Respondent was required to furnish the Union with the names and home addresses of the employees in the bargaining unit. Thus, we conclude that the Respondent's refusal to furnish the requested information in this case was in violation of section 7116(a)(1), (5) and (8) of the Statute.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is ordered that the Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request by the Federal Employees Metal Trades Council, AFL-CIO, the exclusive representative of its employees, the names and home addresses of all employees in the bargaining unit it represents.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request by the Federal Employees Metal Trades Council, AFL-CIO, the exclusive representative of its employees, furnish it with the names and home addresses of employees in the bargaining unit it represents.

(b) Post at all its facilities where bargaining unit employees represented by the Federal Employees Metal Trades Council, AFL-CIO are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a senior official of the Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., November 26, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request by the Federal Employees Metal Trades Council, AFL-CIO, the exclusive representative of our employees, the names and home addresses of all employees in the bargaining unit it represents.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request by the Federal Employees Metal Trades Council, AFL-CIO, the exclusive representative of our employees, furnish it with the names and home addresses of all employees in the bargaining unit it represents.

____
(Activity)

Dated:________ By:______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region I, Federal Labor Relations Authority, whose address is: 441 Stuart Street, 9th Floor, Boston, MA 02116 and whose telephone number is: (617) 223-0920.

(24 FLRA No. 27)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

DEPARTMENT OF THE NAVY,
PORTSMOUTH NAVAL SHIPYARD
(PORTSMOUTH, NEW HAMPSHIRE)

Respondent

and

Case No.: 1-CA-40290

FEDERAL EMPLOYEES METAL TRADES
COUNCIL, AFL-CIO

Charging Party

Mr. Thomas F. Wood
Mr. Richard H. Greenberg
For the Respondent

Mr. Stephen Perry
For the Charging Party

Marilyn H. Zuckerman, Esquire
For the General Counsel

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns an unfair labor practice complaint issued by the Regional Director, Region I, Federal Labor Relations Authority, Boston, Massachusetts against the Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire (Respondent), based on an amended charge filed by the Federal Employees Metal Trades Council, AFL-CIO (Charging Party or Union). The complaint alleged, in substance, that Respondent violated sections 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §7101 *et seq.* (the Statute), by refusing to furnish to the Union the names and addresses of bargaining unit employees represented by the Union.

Respondent's answer admitted the jurisdictional allegations as to the Respondent, Charging Party, and the charge, but denied that the requested information fell within the scope of section 7114(b)(4) of the Statute and that it had violated the Statute.

A hearing was held in Portsmouth, New Hampshire. The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel, FLRA filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

At all times material, the Union has been recognized as the exclusive representative of an appropriate unit of Respondent's employees. The current collective bargaining agreement between the parties became effective October 15, 1981.

The Request and The Answer

By letter dated May 17, 1984, the Union requested that the Respondent furnish it with "a complete listing of all unit employees and their telephone numbers and current addresses."[1] Both prior to and subsequent to the request, Union representatives advised management that the information was necessary in order to represent all unit employees. Union representatives explained that the Union needed the information in order to contact unit employees with active grievances who were on leave at their homes regarding the processing of their grievances. The Union also wanted to send all unit employees a monthly Union newsletter which would "explain general employee benefits, offer insurance premium which aren't offered by the Federal Government, et cetera."

By letter dated May 24, 1984 Respondent formally replied to the request. The letter stated, in part, as follows:

> The telephone numbers and current addresses of unit employees is not information available under the provisions of the Federal Service Labor-Management Relations Statute or the current Agreement between the parties. Furthermore, that information is not subject to disclosure under the provisions of the Privacy Act of 1974.

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[1] The Union has withdrawn its request for the home telephone numbers.

> At the present time, your organization receives a semi-annual eligibility listing of all unit employees. Current addresses and telephone numbers may be requested from individual employees during non-duty hours; however, the employees are under no obligation to release such information.

Availability of Employee Addresses

Respondent maintains the home addresses of employee's in official personnel folders and on Rcladex circular files in the shops and main office. Such information, along with other personnel information, is secured at night in locked cabinets or offices. Access to home addresses and telephone numbers is limited and strictly enforced. Some employees have from time to time expressed concern to personnel employees that individuals "that had no business getting it would have access to their personal information." They have been assured that names and home addresses would only be released to persons who have a need to know on an official basis.

Chapter 294 of the Federal Personnel Manual (FPM) sets forth the instructions of the Office of Personnel Management concerning the availability of information to the public under the Freedom of Information Act, 5 U.S.C. § 552. Appendix C to Subchapter 7, "Guides for Responding to Labor Organization Requests for Names of Employees and Identifying Information," specifically states:

> Agencies should not comply with requests from labor organizations for lists of home addresses or home telephone numbers of employees. Official release of this information would be an unwarranted intrusion into an employee's personal privacy.

See also 5 C.F.R. Part 294, Subpart G - Official Personnel Folder (1984); FPM Letter 294-6, July 25, 1977. But see FPM Supplement 711-1, Instruction 18 (August 10, 1978); 45 FR 78415, 78417 (November 25, 1980); 47 FR 16489 (April 16, 1982); 49 FR 36954, 36956 (September 20, 1984) (information may be disclosed to officials of labor organizations when relevant and necessary to their duties of exclusive representation).

Union Difficulty in Contacting Grievants

There are about 130 grievances filed by the Union each month. The only instance reflected in the record where the Union has been unable to contact a bargaining unit employee concerning the processing of a grievance occurred in 1982. Steward Stephen Perry was representing employee Peter Hamlin. Perry testified that because he did not have Hamlin's home address he could not contact Hamlin at home and could not pursue Hamlin's grievance from the second to the third step within the contractual time frames. It is undisputed that the parties agreement provides for the extension of the time limits under the grievance procedure. Such extensions are common. Perry testified that he spoke with his chief steward, Richard Ian, concerning the possibility of requesting a waiver of the time limits in Hamlin's grievance, but Ian refused, saying he wanted to "stick strictly to the time limit" because the Respondent had extended the time limits so much "that he couldn't keep his schedule straight". As a result, no waiver was requested concerning the Hamlin grievance.

Circumstances Relating to Union Access to Employees

Portsmouth Naval Shipyard is situated on an island about 275 acres in size. There are two entrance bridges. Employees enter by cars, buses, and vans or by foot over four sidewalks. There are parking areas inside and outside the shipyard.

There are close to 9,000 employees working at the shipyard, about 5,500 of whom are in the bargaining unit of the Charging Party. Approximately 2,500 bargaining unit members are members of the Union on dues deduction. The record does not reflect the number of bargaining unit employees, if any, who are members of the Union but are not on dues deduction. Employees work three shifts. Most of the bargaining unit employees work in a controlled industrial area approximately 80 acres in size.

The Union uses the following means to communicate with bargaining unit employees:

a. List of bargaining unit employees. Pursuant to Article 35, Section 1 of the collective bargaining agreement, Respondent furnishes the Union semiannually an up-to-date list of all unit employees by name, job/position title, grade, check number, and type of appointment. The chief spokesman for the Union stated during negotiations for the agreement that the Union needed the job/position title and type of appointment information on employees so that the Union could solicit new members.

b. Bulletin boards. Under Article 35, Section 7 of the agreement, Respondent provides the Union at least one bulletin board or space on existing bulletin boards in each shop for posting notices concerning Union recreational and social activities, elections, and meetings. Other information can be posted only with Respondent's consent. Shipyard rules do not permit employees to view the bulletin board on work time; however, enforcement of this rule varies among the supervisors, and some supervisors do permit it.

c. New employees' orientation. By Article 5, Section 6 of the agreement, an appropriate Union representative is provided an opportunity to meet with all new employees in a shop or code to give them a brief outline of the Union's function.

d. Officers and stewards. Under the provisions of Article 7 of the agreement, the Union has three officers who spend 40 hours a week on official time. The Union also has 17 chief stewards and 55 stewards to perform representational functions. The ratio is one steward or chief steward for each 75 employees. The agreement provides that permission will be secured for an employee-steward visit and the purpose of the visit will be explained to the appropriate supervisor. This formal procedure is generally not followed except where there are personality problems between the steward and supervisor. A steward can generally approach an employee within his work area for a brief visit, such as to secure the correct address of a Union member, without special permission. Employees in the bargaining unit are distinguishable from non-unit employees, such as supervisors, by the color of the hard hats they are required to wear. A shop steward would be familiar with almost all of the employees in his work area even without the hard hats. Stewards do not receive official time for distribution of literature or for polling employees.

e. Handbilling. The Union on several occasions in the past has distributed material relating to important issues to bargaining unit employees by direct handbilling. Handbilling must be performed during non-duty hours. If it involved matters of a political nature, the handbilling has been done off the premises at the entrances while employees are coming to work. There is no way to distinguish unit employees from the non-unit employees and supervisors among the approximately 9,000 employees of the shipyard unless some are personally recognized by the Union member doing the handbilling. The commotion of large numbers of employees coming to work and the three shifts make handbilling of all employees very difficult. Where the issues have strictly involved the shipyard, handbilling has been performed inside the shipyard by employees who are off-duty giving literature to employees who are also off-duty. In both cases, whether the handbilling was done outside or inside the shipyard, large quantities of the literature have been left at time clocks and lunch rooms where employees congregate.

f. Telephone. Union officers are able to use the telephones in the Union office to contact individual employees by telephone at their work locations. If the telephone extension is not known, it must be secured from the personnel office. It is difficult to contact employees working on a submarine or drydock. There may be two or three telephone extensions for the 200-400 employees working on a submarine and one telephone extension for those working in the drydock.

g. Union meetings. The Union and affiliated locals hold meetings once a month on varying dates. The Union may post notices of these meetings on bulletin boards. Non-members of the Union do not generally come to the meetings.

h. Internal mail system. The Union has used the internal mail system to send documents or letters to management offices concerning representational matters and to individual employees concerning their grievances. There is no evidence that it is an established practice for the Union to use the internal mail system for mass mailings to all employees.

i. Direct mail. The Union has in its possession the names and addresses of all of its members. These are obtained from application forms and dues deduction forms. In the past the Union and Locals have occasionally used the lists to send out newsletters to members' homes during election campaigns or to request feedback for contract proposals.2/ Ten years ago an insurance company was authorized to use the mailing list on at least one occasion in an attempt to sell insurance to Union members. Following complaints from members, additional requests from the same company were turned down.

The information concerning Union members, including their names, addresses, and other information, is maintained by the Union in the form of address cards which are physically located in open trays on top of file cabinets in the Union office. The address cards are not secured and are accessible to anyone who has access to the Union office. The names and addresses of Union members have also recently been added to a computer which will automatically affix gummed address labels to the proposed monthly newsletter. The Union wants to add to this computer file the home addresses of all unit employees who are not Union members so that they too may receive the newsletter.

Discussion, Conclusion, and Recommendations

The issue for determination is whether Respondent violated section 7116(a)(1), (5), and (8) of the Statute by refusing to provide the Union with the home addresses of bargaining unit employees. The General Counsel claims that (1) the home addresses are presumptively relevant and necessary information; (2) the Union, in any event, demonstrated that the information requested was necessary and relevant; (3) the names and home addresses are disclosable under the Statute notwithstanding the Privacy Act or Federal Personnel Manual; (4) there is no obligation for an exclusive representative to prove that it was not feasible to reach bargaining unit employees through alternative means; and (5), to the extent relevant, all alternative means of access are insufficient.

Respondent defends on the basis that (1) the information requested is not relevant and necessary under section 7114(b)(4) of the Statute; (2)

2/ The former recording secretary of the Union testified without contradiction that the Union solicited comments concerning contract proposals from Union members, but that he was unaware of any formal solicitation of comments from non-members; further, the collective bargaining agreement is subject to ratification only by Union members.

the Charging Party has other adequate means of communicating with bargaining unit employees; and (3) Respondent is prohibited by law from releasing employees' home addresses.

As pertinent here, section 7114(b)(4)[3] of the Statute requires an agency, upon request, to furnish an exclusive representative with data which is "necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining." It is well established that under section 7114(b)(4) of the Statute a union is entitled to receive information necessary to the performance of its representational responsibilities, including negotiations, administration of the collective bargaining agreement, and the effective evaluation and processing of grievances.

An exclusive representative is responsible for representing the interests of all employees in the unit (section 7114(a)(1)) and must have effective means of communicating with them. Here the Union is seeking the home addresses of all employees in the unit in order to contact employees with active grievances and to send all unit employees a monthly newsletter. The publication of a newsletter is a common means used by organizations to present information, reports, analyses and forecasts to members or other special audiences. Newsletters are also often used to seek responses or other actions. Such a newsletter can be a very effective means of communication. Therefore, the home addresses of bargaining unit employees are relevant in this respect to the Union's carrying out of its representational obligations and "for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining."

Section 7114(b)(4) provides that the "duty of an agency and an exclusive representative to negotiate in good faith shall include the obligation--

> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--
>
> (A) which is normally maintained by the agency in the regular course of business;
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining[.]"

However, since furnishing the home addresses of employees impinges to some degree on the personal privacy of employees, it is necessary to determine whether the Union has other effective means of communicating with the employees. Cf. Internal Revenue Service, Office of the District Director, Jacksonville District, Jacksonville, Florida, 2 A/SLMR 214, affirmed FLRC No. 72A-50, 2 FLRC 106 (1974). I agree with the General Counsel that the other means available to the Union are ineffective for the intended purpose of sending newsletters to all unit employees.[3/] Dissemination of a newsletter or its contents to all unit employees by means of bulletin boards, new employees' orientation, officers and stewards on non-duty time, handbilling on non-duty time, telephone, and union meetings would be a cumbersome, inefficient, and a hit or miss proposition in terms of reaching all unit employees. The record does not reflect that the internal mail system can be used for mass mailings to all employees. The use of the U.S. mails would be the most reliable means of reaching all unit employees with a newsletter. Therefore, the home addresses of employees are "necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining."

Section 7114(b)(4) of the Statute requires an agency to furnish data only "to the extent not prohibited by law". The Freedom of Information Act, 5 U.S.C. § 552, as amended, provides that information in the possession of government agencies is available to the public except when the information is subject to one of the exemptions of the act. For example, personnel and similar files cannot be released where disclosure would constitute a clearly unwarranted invasion of personal privacy (5 U.S.C. § 552(b)(6)). Chapter 294 of the Federal Personnel Manual sets forth the instructions to all government agencies concerning the availability of information to the public under the Freedom of Information Act. Appendix C to Subchapter 7, "Guides for Responding to Labor Organization Requests for Names of Employees and Identifying Information," specifically states that agencies should not furnish labor organizations with employees' home addresses or telephone numbers since release of such information would constitute an "unwarranted intrusion into an employee's personal privacy". This instruction is labeled a "Guide" and must be treated as such. The Office of Personnel Management has otherwise

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[3/] With respect to the Union's alleged need for all home addresses in order to contact employees with active grievances, the Union officer and steward network at the shipyard should normally suffice to obtain the home addresses of employees with active grievances. This should be one of the first items of information obtained during the initial steward contact with a grievant. In those emergency situations where the information is not available to the Union and it is necessary for a steward to contact a grievant at home, it could be argued that the agency would be required to furnish the home address pursuant to section 7114(b)(4) for the effective processing of a grievance.

recognized in publishing notices of its systems of records that a "routine use" of information in employee personnel records,[4/] including home residences and mailing addresses, is disclosure "to officials of labor organizations recognized under 5 U.S.C. Chapter 71 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions." See FPM Supplement 711-1, Instruction 18 (August 10, 1978); 45 FR 78415, 78417 (November 25, 1980); 47 FR 16489 (April 16, 1982); 49 FR 36954, 36956 (September 20, 1984). Therefore, it is concluded that the disclosure of home addresses is not specifically prohibited by law or regulation.

Since, as noted, the furnishing of employee home addresses would impinge to some degree on the employee's rights to privacy, the needs of a labor organization for data to effectively represent the unit employees must be balanced against the employee's right to privacy. The furnishing by the Respondent to the Union of employee home addresses for representational purposes would not constitute an unwarranted intrusion on the privacy of such employees. The Union is not an unknown, outside organization to such employees. It has a lawful relationship to them. There is no evidence that the Union would make any improper use of the home addresses or, in light of the Union's previous bad experience with outside organizations using their mailing list some years ago, that such organizations would be given access to the addresses again. The daily personal mail of most persons brings a steady barrage of unsolicited flyers, advertisements, and solicitations. Employees may have to spend a moment or two deciding whether to read the Union's newsletter or to toss it out along with other unwanted mail. Considering the needs of the Union to effectively communicate with unit employees, any intrusion on employees' personal privacy caused by the furnishing of home addresses to the Union for representational purposes is minimal and not unwarranted.

Respondent's conduct in refusing to grant the Union's request for the addresses of unit employees constitutes a failure to comply with section 7114(b)(4) of the Statute in violation of sections 7116(a)(1) and (8) and a refusal to bargain in good faith with the Union in violation of sections 7116(a)(1) and (5) of the Statute.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the

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[4/] The official personnel folder of each employee is under the jurisdiction and control of, and is part of the records of, the Office of Personnel Management, 5 C.F.R. § 293.303 (1984).

Authority hereby orders that the Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire shall:

1. Cease and desist from:

(a) Refusing or failing to furnish upon request of the Federal Employees Metal Trades Council, AFL-CIO, the addresses of all unit employees.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute.

(a) Upon request, furnish to the Federal Employees Metal Trades Council, AFL-CIO, the names and addresses of all unit employees.

(b) Post at its facilities at the Portsmouth Naval Shipyard, copies of the attached Notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Commander, Portsmouth Naval Shipyard and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to 5 C.F.R. section 2423.30 notify the Regional Director, Region I, Federal Labor Relations Authority, Boston, Massachusetts, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

Garvin Lee Oliver
GARVIN LEE OLIVER
Administrative Law Judge

Dated: April 25, 1985
Washington, DC

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse or fail to furnish upon request of the Federal Employees Metal Trades Council, AFL-CIO, the addresses of all unit employees.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, furnish to the Federal Employees Metal Trades Council, AFL-CIO, the names and addresses of all unit employees.

____
(Agency or Activity)

Dated: ______________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region I, whose address is: 441 Stuart Street, 9th Floor, Boston, MA 02116, and whose telephone number is: (617) 223-0920.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
SCOTT AIR FORCE BASE, ILLINOIS

Respondent

and

Case No. 5-CA-40232

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, SEIU, LOCAL R7-23

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the General Counsel and the Charging Party (the Union). The Respondent (Agency) filed an opposition to the exceptions. The issue is whether it is an unfair labor practice under the Federal Service Labor-Management Relations Statute (the Statute) for the Respondent to refuse a request, made pursuant to section 7114(b)(4) of the Statute, to provide the Union with the home addresses of new employees in a bargaining unit which the Union exclusively represents.

In a recent Decision and Order on Remand, Farmers Home Administration Finance Office, St. Louis, Missouri, 23 FLRA No. 101 (1986) (FHAFO), we reviewed the Authority's previous decision concerning the release of the names and home addresses of bargaining unit employees to exclusive representatives. We concluded that the release of the information is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets all of the other requirements established by section 7114(b)(4). We also determined that the release of the information is generally required without regard to whether alternative means of communication are available. Consistent with our decision on remand in FHAFO, we conclude that Respondent's refusal to provide the Union with the home addresses sought in this case violated section 7116(a)(1), (5) and (8) of the Statute.

II. Facts

The Union requested the home addresses of all new bargaining unit employees in order to send them an orientation package. The Respondent denied the request on the ground that disclosure of the information would violate the Privacy Act.[1] However, the Respondent gave the Union a list of the new employees and their work addresses.

III. The Administrative Law Judge's Decision

The Judge concluded that the Respondent had not failed to comply with the requirements of section 7114(b)(4) of the Statute in violation of section 7116(a)(1), (5) and (8) when it refused to provide the Union with the home addresses of all new unit employees represented by the Union. The Judge found that the home addresses were reasonably available to the Respondent and that the Union was seeking the data for a relevant purpose within the meaning of section 7114(b)(4) of the Statute. However, the Judge also found that the Respondent's willingness to have mail addressed to employees at their work addresses delivered through the Respondent's internal mailing system provided the Union with an effective alternative means of communicating with the employees. He therefore concluded that the Union had not established that the home addresses were necessary within the meaning of section 7114(b)(4) and he recommended that the complaint against the Respondent be dismissed.

IV. Positions of the Parties

The positions of the parties are set forth in the General Counsel's and the Union's exceptions and the Respondent's opposition.[2]

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[1] Privacy Act of 1974, 5 U.S.C. § 552a (1982).

[2] When the Authority decided, for reasons discussed more fully in the decision on remand in FHAFO, to review the entire issue of the release of employees' names and home addresses and invited agencies, unions, and interested persons to submit *amicus* briefs addressing the issue, this case was one of those listed as being under consideration. While the parties in this case did not submit *amicus* briefs, the Department of the Air Force and the National Association of Government Employees did file *amicus* briefs outlining their positions.

In their exceptions, the General Counsel and the Union reiterate arguments made before the Judge that mailings made to work locations lack confidentiality and that receipt of such material at the workplace is disruptive to work procedures. The General Counsel also argues that the work address information provided the Union was not sufficiently accurate. In its opposition, the Respondent essentially disagrees with the arguments that the alternative means of communication lack confidentiality, would be disruptive and are otherwise inadequate.

V. Analysis and Conclusion

As noted above, the Authority in the decision on remand in FHAFO concluded that the release of home addresses of bargaining unit employees to the exclusive representatives of these employees is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets the other requirements of section 7114(b)(4). We also determined that agencies are required to furnish such information without regard to whether alternative means of communication are available. Based on our decision on remand in the FHAFO case, we find that the Respondent in this case was required to furnish the Union with the home addresses of the new employees in the bargaining unit. Thus, we conclude that the Respondent's refusal to furnish the requested information in this case constituted a violation of section 7116(a)(1), (5) and (8) of the Statute.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is ordered that the Department of the Air Force, Scott Air Force Base, Illinois, shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request of the National Association of Government Employees, Local R7-23, the exclusive representative of its employees, the home addresses of all new employees in the bargaining unit it represents.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights assured them by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request by the National Association of Government Employees, Local R7-23, the exclusive representative of its employees, furnish it with the home addresses of new employees in the bargaining unit it represents.

(b) Post at all its facilities where bargaining unit employees represented by the National Association of Government Employees, Local R7-23 are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a senior official of the Department of the Air Force, Scott Air Force Base, Illinois, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region V, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., November 26, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request of the National Association of Government Employees, Local R7-23, the exclusive representative of our employees, the home addresses of all new employees in the bargaining unit it represents.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request by the National Association of Government Employees, Local R7-23, the exclusive representative of our employees, furnish it with the home addresses of all new employees in the bargaining unit it represents.

____
(Activity)

Dated: ____________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region V, Federal Labor Relations Authority, whose address is: 175 W. Jackson Blvd., Suite 1359-A, Chicago, IL 60604 and whose telephone number is: (312) 353-6306.

(24 FLRA No. 28)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

. . . .

DEPARTMENT OF THE AIR FORCE
SCOTT AIR FORCE BASE, ILLINOIS

Respondent

and

Case No.: 5-CA-40232

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R7-23

Charging Party

. . . .

Major Charles L. Brower, Esquire
For the Respondent

Mark B. Clevenger, Esquire
For the Charging Party

Sandra J. LeBold, Esquire
For the General Counsel

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns an unfair labor practice complaint issued by the Regional Director, Region Five, Federal Labor Relations Authority, Chicago, Illinois against the Department of the Air Force, Scott Air Force Base, Illinois (Respondent), based on an amended charge filed by the National Association of Government Employees, Local R7-23 (Charging Party or Union). The complaint alleged, in substance, that Respondent has refused to furnish to the Union the home addresses of new employees; that such refusal constitutes a violation of section 7114(b)(4) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §7101 et seq. (the Statute); and an unfair labor practice in violation of sections 7116(a)(1), (5) and (8) of the Statute.

Respondent's answer denied any violation of the Statute.

A hearing was held at Scott Air Force Base, Illinois. The Respondent, Charging Party, and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Counsel for the Respondent and the General Counsel filed helpful briefs, and the proposed findings have been adopted in whole or in substance where found supported by the record as a whole. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

1. At all times material herein, the Union has been recognized as the exclusive representative of an appropriate unit of Air Force employees assigned to Respondent (Tr. 6; Joint Ex. 5).

2. On March 14, 1984, the Respondent conducted a new employee orientation session (General Counsel's Ex. 1(c) and 1(d)). This was the first such session that the Respondent had conducted in almost two years. The Union won the right to be present and distribute literature at new employee orientation sessions during its 1982 contract negotiations[1/] (Tr. 16, 91-92, Joint Ex. 5). This was the first orientation session since those negotiations (Tr. 16).

3. Carl Denton, Union president, was informed of the session by Raymond Rush, labor relations specialist, on the morning of March 14, 1984 at approximately 8:20 a.m. Mr. Rush first became aware of the meeting that same morning. The session had begun at 8:00 a.m. Mr. Denton rushed over to the meeting, stopping on the way at the Union office to pick up some copies of the contract and other Union literature (Tr. 13-14).

4. Mr. Denton arrived at the orientation at about 9:15 a.m. at which time the orientation participants were on break. Although Mr. Denton missed the first two segments of the orientation program -- the

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[1/] Article XXIII, Section 12 of the collective bargaining agreement provides:

> The Union will be permitted to have a maximum of one (1) representative present during new employee orientations. The Employer will recognize the Union representative present and agrees to cover the major features of Title VII. The Union may distribute its own orientation package, including a copy of the labor Agreement and the representative may be called on to answer questions directed to him/her. (Joint Ex. 5).

introduction from 8:00 to 8:10 a.m. and the staffing and equal employment opportunity segment which began at 8:10 a.m. -- he was present when the next scheduled segment -- employee management relations -- began at 9:35 a.m. (Tr. 14-15; Joint Ex. 4).

5. During this segment, Lorenda Kelch, the presiding management official, introduced Mr. Denton and permitted him to address the group of approximately 65 employees. Denton was nervous and ill-prepared due to the last minute notice. However, he advised the group of the general purpose of the Union, the location of the Union office, the Union office telephone number, the names of the officers, that the Union must represent everyone in the bargaining unit, and that there were Union stewards available to assist them. He distributed some copies of the collective bargaining agreement, some NAGE "news-type bulletins," the local NAGE newspaper, and the national NAGE newspaper. He ran out of most of the materials because, not being informed of the session in advance, he did not know how many employees would be present. Later, during a question and answer session, Ms. Kelch deferred to Denton to answer a question which had been directed to her. (Tr. 14-18; 43-50).

6. Between July 21, 1982 and March 14, 1984, Respondent hired 166 employees (Joint Ex. 3). Only 66 attended the March 14, 1984 orientation session, although Respondent considered attendance to be mandatory (Joint Ex. 2; General Counsel's Ex. 2).

7. On March 21, 1984 Mr. Denton sent to Respondent a letter requesting, among other things, the home addresses and office symbols of all employees hired since the last previous new employee orientation session (Joint Ex. 1). An office symbol is an employee's official business address (Tr. 54). The information was requested "in order to provide all new employees with a union orientation session and to police our rights in this regard . . ." (Joint Ex. 1).

8. The Union wanted to communicate with both those who had attended the orientation session and those who had not (Tr. 21). It wished to inform new employees who did not attend the session of the existence of the Union, the identity of Union officers in the various areas, and the location of the Union office, to let them know that if there were problems, there was a Union (Tr. 20). It wanted to communicate with the employees who had attended the session regarding matters which the Union may have inadequately presented or omitted due to the failure of Respondent to give the Union advance notice of the session (Tr. 67-68). Also, the Union desired to communicate concerning matters presented by management at the orientation session with which it did not agree (Tr. 19-20, 52). The Union wanted to give both groups of new employees a new employee orientation package. Although the Union had not determined exactly what it would contain, it would include a copy of the labor management agreement. The Union had run out of copies of the agreement at the session. The package would also possibly include information

concerning negotiations and important grievances (Tr. 53-54, 61). Mr. Denton asserted that some of the material might also possibly be confidential (Tr. 67).

9. In response to the Union's March 21, 1984 request, Respondent, by letter of April 4, 1984, replied to the Union's request for home addresses by stating, ". . . this office is prohibited by applicable provisions of the Privacy Act from releasing home address[es] of employees." However, Respondent promised to provide a listing of new employees by organization under separate cover. Respondent included a copy of the attendance form filled out by each of the employees who attended the March 14 orientation session. On each form the employee listed his "organization and office symbol." (Joint Ex. 2; General Counsel's Ex. 2).

10. Respondent, by letter of April 17, 1984, provided the Union with a listing by organization of the employees hired between July 21, 1982 and March 14, 1984. An organizational symbol for each listing was included in the upper right-hand corner. (Joint Ex. 3).

11. By letter of May 2, 1984 the Union complained that an unspecified number of the office symbols were incorrect, and that even if they were correct, "Base Distribution [Respondent's internal distribution system] would not necessarily deliver the mailings." The Union stated, "We request that you either provide correct office symbols for each new employee listed or provide their home address." (Joint Ex. 6A).

12. Following a May 8 interim response (Joint Ex. 6C), Respondent, by letter of June 22, 1984, informed the Union that although the base distribution system has always restricted delivery of mail to exclusive government business, management had been authorized on a test basis to deliver mass mailings "as long as there is a correct functional address symbol" (2) that if the address were incorrect, the mail would be indorsed "undeliverable as addressed" and returned to the sender, and (3) that if the Union were to inform Respondent of any "specific instances" of incorrect data, Respondent would correct them (Joint Ex. 6B). The record does not reflect a further Union response.

13. Respondent and the General Counsel are in dispute as to whether Respondent provided the Union the "office symbols," a business address or "correct functional address symbol," of each new employee which could have been used with the internal distribution system. The dispute stems from the term "office symbol" used in the Union's request. The Union requested "office symbols" in its March 21, 1984 request. Respondent furnished a listing of new employees "by organization" and the listing included organizational symbols. That the organizational symbols may not be correct as a mailing address is illustrated by the fact that the organizational symbols do not in every instance match "organization and office symbol" listed by some employees themselves on the attendance form of the session. For example, a random check indicates that Respondent's listing for the "375 ABS Gp" includes Gary L. Hearne and Herman A. Hockaday, Jr. However,

Hearne and Hockaday attended the session and listed their respective "organization and office symbol" as "375 ABG/SSRS" and "375 ABG/DAD." Respondent's listing of "MCO CT CQTR" includes Gladvs A. Ronck. Ronck listed her organizational and office symbol as "HQMAC/TRPRC." Similarly, Oscar Gary Wells supposedly in "MAC CM MADA" listed "HQMAC/DADD." (Joint Ex. 3; General Counsel's Ex. 2). The record does not indicate which would be the "correct functional address symbol" for use of the internal mail system. However, the Union made no effort to have Respondent correct any noted discrepancies, which Respondent offered to do, and it is clear under these circumstances that the correct functional address symbol of each new employee is available to the Union upon request.

Circumstances Relating to Union Access to New Employees

14. Scott Air Force Base is situated on approximately 2500 acres of land in southwest Illinois (Tr. 103). Employees work in approximately 100 different buildings (Tr. 30). There are 3,000 - 3,500 civilian employees working on the base. Of these, 2,400 - 2,500 are bargaining unit employees (Tr. 29, 62, 104) and 400 are Union members (Tr. 30). Employees live in various cities and towns covering a wide geographic area which includes the states of Illinois and Missouri. Some employees live as far as 50 miles away from the base (Tr. 26).

15. While a majority of civilian employees are located in a central two-building complex,[2] large numbers of employees work in buildings which are some distance from this area. The Union estimated that 40% or approximately 1000 bargaining unit employees are not located in the central two-building complex (Tr. 114-115). Respondent estimated that 1200 - 1300 civilian employees work in buildings other than the central two-building complex[3] (Tr. 103-104). Buildings 861, 859, 865 and 700 make up Area Two, which is approximately one mile from the central complex (Tr. 116). The commissary is a ten minute walk from the central area. The Consolidated Airlift Maintenance Squadron and the Civilian Engineering Squadron are each two or three blocks from the central complex (Tr. 117). The Hospital or Medical Squadron is approximately one-half mile from the central location (Tr. 118). Certain buildings, notably "DECCO" Headquarters and MAC Headquarters, have secured areas requiring badges and an escort for entrance. However, these secured areas have public access lobbies. (Tr. 30, 62-63).

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[2] The two buildings which make up the "complex", Headquarters MAC and Headquarters AFCC, are not connected, but are separated by two or three blocks and a four-lane highway (Tr. 117).

[3] Respondent did not provide an estimate regarding the number of bargaining unit employees working in the two-building complex. Respondent estimated that 2500 of 3000 civilian employees work in a somewhat larger central area, leaving 500 civilian employees working in non-centralized areas throughout the base (Tr. 103-104).

16. The Union has the following means of communicating with bargaining unit employees.

a. Use of bulletin boards.[4] There are 50 - 80 official bulletin boards and 25 - 30 other bulletin boards (Tr. 55, 97-98). The Union has had difficulty acquiring space on only three bulletin boards (Tr. 57-59). The Union asserted that information on the bulletin boards is often outdated (Tr. 24); however, it is the Union which determines what information shall appear on the reserved portions of these bulletin boards (Tr. 55, 97-98). The Union also claimed that it had insufficient numbers of stewards to maintain the bulletin boards in all buildings; however, pursuant to the collective bargaining agreement, the number of stewards is up to the Union. Finally, the Union claims that employees seldom look at bulletin boards, and this would not be a reliable way to reach new employees with the large quantity of information that the Union wanted to deliver in the orientation package (Tr. 24-25). Although, the Union could post notices concerning the availability of the information from the Union office, I agree that bulletin boards would not be a reliable way to reach employees with a large quantity of information.

b. Use of Respondent's newspaper and base bulletin to make general announcements and notices of meetings, picnics, and parties, and for unofficial announcements.[5] (Tr. 25, 98-99). Although, the Union could publish a notice inviting any new employee interested in an orientation package to call the Union office, these media would not be able to provide the space the Union wished to provide new employees with a complete orientation to the Union.

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[4] Article XIII, Section 13 provides:

> The Employer agrees to provide reserved space on Official Bulletin Boards, 18"X22", for the posting of Union Notices and similar informational material. Upon written request from the Union, the Employer will also provide reserved space on such other bulletin boards which the Employer routinely uses to post notices and other information to bargaining unit employees regarding personnel policies, practices and other matters affecting working conditions. The Union agrees that literature posted or distributed must not violate any law, the security of the bases, or contain scurrilous or libelous material. In addition, the posting or distribution of material relating to partisan political matters or material which reflects unfairly upon the integrity or motives of any individual, another employee organization or upon the Federal Government will not be permitted. All costs incident to reproduction, preparation, and distribution of Union material shall be borne by the Union.

c. Use of intra-base telephone facilities and an office.[6] Current office telephone numbers of employees are not maintained (Joint Ex. 2). Calling after hours would also be time-consuming and difficult due to the lack of home telephone numbers or telephone directories of the many different communities in which the employees live.

d. Use of designated locations to distribute handbills or other informational literature, including Union newspapers[7] (Tr. 30, 101-102).

5/ Article XIII, Section 16 provides:

> The Employer agrees that the Union may use the Towncrier section of the base newspaper and the Notice Section of the Base Bulletin to announce general membership meetings and events: such as, picnics, retirements, or Christmas parties. It is agreed that the Union shall be solely responsible for the content and accuracy of such announcements.

6/ Article XXIII, Section 3 provides:

> The Employer agrees to permit the officers and representatives of the Union to utilize intra-base telephone facilities.

Section 10 provides:

> Free rent will be provided the Union.

7/ Article VI, Section 13 provides:

> The Employer shall permit the union to distribute informational literature, including Union newspapers, information on membership in the Union and benefits provided by the Union, in designated locations, where unit employees are assigned, within the buildings throughout Scott Air Force Base. The Union agrees that it shall not distribute any libelous or scurrilous material or violate any law, applicable regulations or other provisions of this Agreement in exercising any right under this section. It is agreed by the Union that any material distributed in accordance with this section shall be made by employees during their nonwork time and said distribution shall not interfere with work operation.

The Union has never invoked this contractual right. (Tr. 101-102). However, since the Union was only trying to communicate with 166 new employees, handbilling of all employees at particular locations would not be efficient.

e. A listing of bargaining unit employees is to be provided to the Union once a year upon request[8/] (Tr. 102). The agreement provides that the list will include names, grades, series and organizational element. Since August 1982 the Union has requested such a listing only once (Tr. 103). The total list would not help in reaching new employees. The Union already knows their identities.

f. Use of officers and stewards.[9/] Pursuant to the collective bargaining agreement the Union may designate the number of stewards "reasonably required . . . to assure that each employee is properly represented, except that no more than one steward may be assigned per shift to a work area." The Union has approximately 18 officers and 24 stewards on the base. However, only four or five of the stewards are General Schedule employees. Stewards are not assigned to every shift and every building. Stewards also have only limited access to employees working in secured areas. (Tr. 63-64, 100, 108; Respondent's Ex. 2).

g. The Union holds meetings once a month. These meetings are open to Union members only (Tr. 31-32, 100-101). As noted, Respondent permits the Union to announce meetings in the base newspaper and bulletin. Meetings during non-duty hours are not well attended (Tr. 38-31, 100-101). Respondent's "mandatory" orientation session during duty hours was also not well attended.

[8/] Article XXIII, Section 7 provides:

> A listing, including the names, grades, series and organizational element of each bargaining unit employee shall be provided the Union once every twelve months. Such provision shall be based on a specific written request from the Union to the Central Civilian Personnel Office.

[9/] Article VI, Section 1 provides, in part:

> The Employer agrees to recognize the officers of the Union and all stewards duly designated by the Union. The number of stewards shall be the number reasonably required in order to assure that each employee is properly represented, except that no more than one steward shall be assigned per shift to a work area.

h. The Union publishes a Union newsletter when it can afford to do so, which is not very often. It is mailed to Union members and others who supply the Union with their addresses (Tr. 31, 99-100; Respondent's Ex. 2).

17. The Union does not have access to the base's internal mailing system free of charge. It is restricted to official mail. As noted in paragraph 13 above, sometime after the information request was made in March 1984, management, in June 1984, disclosed the existence of a test whereby mass mailings from unofficial sources could be delivered through the base distribution system. The effective period for the test was not stated. It appears that at one time the test was scheduled to last for one year and would have expired at the end of 1983. It did not (Tr. 27, 66, 69-70). All of the parties, as of the time of the hearing, were uncertain as to whether the Union could or could not use the internal mail system pursuant to this test (Tr. 68-70). In its brief Respondent now takes the unequivocal position that the Union could have used the internal mail system pursuant to the experimental test. However, I decline to make such a finding because of the obvious uncertainty of its availability during the relevant period.

18. Although the Union could not use the internal mailing system cost-free, it still had access to the employees through the system by addressing mail to an employee's office symbol, paying the necessary U.S. postage, and sending it through the U.S. Postal Service which would ultimately transfer the mail to Respondent for distribution through Respondent's internal mailing system. (Tr. 65-66; Respondent's brief, p. 3; Joint Ex. 6A, par. 2, last sentence).

19. Mr. Denton testified that addressing mail to employees' business addresses on the base would not be an acceptable alternative to mailing to their home addresses. He testified that he has received reports of "several occasions" when personal mail has been opened first by secretaries or other administrative personnel before being received by the addressees. He has had some of his own mail so opened with a "sorry" written on it. He also felt that a Union orientation package might include items of a confidential nature which the Union wouldn't want management as a whole to know about. Finally, Mr. Denton testified that such mail might disrupt the work of the base (Tr. 27-28; 60-61).

Availability of Home Addresses

20. Respondent maintains the home addresses of employees in the regular course of business in official personnel files and in computer data banks (Tr. 72, 78). Such data does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining (Tr. 7).

a. Each official personnel file contains a home address, but there is no guarantee it is accurate (Tr. 74). The personnel files are used by six different sections in the Civilian Personnel Office containing about 30 employees. At any given time approximately 20% (about 640) of the personnel files are out of the master file, being used by one of the 30 employees (Tr. 73). Assuming that each personnel file were not signed out of the master file, it would take a civilian personnel office employee earning from $4.50 to $16.00 per hour approximately two minutes to manually extract the home address. (Tr. 73-75). Under these conditions, it would require about five hours and the cost to Respondent of extracting the home addresses of each of the new bargaining unit employees would be anywhere from $25.00 to $85.00. The higher figure would result if higher graded employees were used in order to provide the information in an extremely short time (Tr. 74). There is no indication that the Union made time of the essence in its request. If the file were not in the master file and Respondent were required to search for the file throughout the personnel office, the time and cost required could increase significantly (Tr. 73-74).

b. The home addresses are also maintained in Respondent's computer data base (Tr. 78-80), but in order to extract that information the following tasks (with costs indicated) must be performed (Tr. 78):

TASK	TIME	COST PER HOUR	TOTAL COST OF TASK
Research Data Base	1-2 hours	$6.92-$16.73/hr	$6.92-$33.46
Define Computer Program (computer time)	1-2 hours	$150.00 hr	$150.00-$300.00
Retrieve Information (computer time)	30 minutes	$150.00 hr	$75.00
TOTAL COST			$231.92-$408.46

Discussion, Conclusions, and Recommendations

The issue for determination is whether Respondent violated section 7116(a)(1), (5), and (8) by refusing to provide the Union with the home addresses of new employees. The General Counsel claims that the home addresses are reasonably available, are necessary to enable the Union to carry out its representational obligations of providing new employees a Union orientation package, and there are no effective alternative means of communicating with the 160 new employees.

Respondent defends on the basis that it complied with the Union's request, as the Union requested home addresses or office symbols, and it offered the Union the office symbols. Respondent also contends that the home addresses are not reasonably available; the Union seeks the home addresses for purposes not embraced by section 7114(b)(4); and the Union has at its disposal effective means of communicating with the new bargaining unit members.

As pertinent here, section 7114(b)(4)[10] of the Statute requires an agency, upon request, to furnish an exclusive representative with data "which is reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining."

The home addresses of employees are "reasonably available." They are contained in official personnel files and approximately 80% of the files are readily available in a master file area. The remainder are in working areas of the personnel office. If disclosure were required, management would presumably compile the information from the files rather than use the more expensive computer retrieval method. Since time is not of the essence, the record reflects that Respondent could use lower graded employees for the manual file retrieval for a cost in the $25-$85 range.

It is well established that under section 7114(b)(4) of the Statute a Union is entitled to receive information necessary to the performance of its representational responsibilities, including negotiations, administration of the collective bargaining agreement, and the effective evaluation and processing of grievances.

Here the Union wanted to provide new employees with a Union orientation package, including a copy of the collective bargaining agreement. In my view. administration of the collective bargaining agreement includes advising unit employees of their rights under the agreement. Sending new employees a copy of the agreement is a most complete way of informing them

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[10] Section 7114(b)(4) provides that the "duty of an agency and an exclusive representative to negotiate in good faith shall include the obligation --

> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data --
>
> > (A) which is normally maintained by the agency in the regular course of business;
> >
> > (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
> >
> > (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining[.]"

/Case [illegible] / Errata

of their rights. Thus, their addresses were relevant to the Union's carrying out of its representational obligations. Therefore, the Union was seeking the information for a purpose embraced by section 7114(b)(4).

However, since furnishing the home addresses of employees impinges to some degree on the personal privacy of employees, it is necessary to determine whether the Union has other effective means of communicating with the new employees. Cf. Internal Revenue Service, Office of the District Director, Jacksonville District, Jacksonville, Florida, 2 A/SLMR 214, affirmed FLRC No. 72A-50, 2 FLRC 106 (1974). While I agree with the General Counsel that most of the other means available to the Union are ineffective for the intended purpose, the record reflects that Respondent either has, or is willing to, furnish the Union the correct business addresses of the new employees. Although the Union can not use Respondent's internal mailing system by itself and on a cost-free basis, it can still have access to the system by addressing mail to an employee at his business address or office symbol, paying the necessary U.S. postage, and depositing it in the U.S. mail. The U.S. Postal Service will ultimately transfer the mail to Respondent, and it will be delivered to the employee through Respondent's internal mailing system.

The General Counsel argues that it is necessary to send the mail to an employee's home address in order to preserve its confidentiality and so as not to disrupt the employee's work. There would be no appreciable difference in terms of confidentiality between sending sealed envelopes through the U.S. Postal Service for delivery to an employee's home address and sending sealed envelopes through the U.S. Postal Service for ultimate delivery by Respondent's internal mailing system to an office address. Considering the large number of employees at the base, there is no basis for concluding that the "several occasions" of personal mail being opened by secretaries were extensive or other than isolated occurrences or honest mistakes. It also could hardly be expected that the contents of a mailing to 160 new employees, a significant percentage of whom presumably do not belong to the Union, would remain confidential. With respect to possible disruption of work by mailings to the office, there is no indication that management would consider the receipt and review of Union orientation packages by employees to be disruptive in these circumstances. The Union would be in a good position to meet any such objection if it took place considering the alternatives and the fact that Respondent has pointed to this method as "without doubt the most effective alternative means of communication available to the Union" (Respondent's brief, p. 20).

In light of the existence of the foregoing effective means of communication with new employees for the purpose outlined by the Union, it has not been established that a list of the home addresses of new employees is "necessary for a full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining." Accordingly, it is recommended that the Authority issue the following Order pursuant to 5 C.F.R. § 2429.29:

ORDER

It is hereby Ordered that the Complaint in Case No. 5-CA-40232 be, and it hereby is, DISMISSED.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: April 9, 1985
Washington, D.C.

/case No406/errata

Federal Labor Relations Authority

Washington, D.C. 20424

ERRATA November 26, 1986

Report of Case Decisions Number 406 (November 26, 1986) 1/

Pages 221 thru 224 — 1. Remove incorrect pages and insert corrected pages.

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Attachment

1/ Footnote on page 221 was not numbered.

I3.F 31/21-3:

the Charging Party has other adequate means of communicating with bargaining unit employees; and (3) Respondent is prohibited by law from releasing employees' home addresses.

As pertinent here, section 7114(b)(4)[3] of the Statute requires an agency, upon request, to furnish an exclusive representative with data which is "necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining." It is well established that under section 7114(b)(4) of the Statute a union is entitled to receive information necessary to the performance of its representational responsibilities, including negotiations, administration of the collective bargaining agreement, and the effective evaluation and processing of grievances.

An exclusive representative is responsible for representing the interests of all employees in the unit (section 7114(a)(1)) and must have effective means of communicating with them. Here the Union is seeking the home addresses of all employees in the unit in order to contact employees with active grievances and to send all unit employees a monthly newsletter. The publication of a newsletter is a common means used by organizations to present information, reports, analyses and forecasts to members or other special audiences. Newsletters are also often used to seek responses or other actions. Such a newsletter can be a very effective means of communication. Therefore, the home addresses of bargaining unit employees are relevant in this respect to the Union's carrying out of its representational obligations and "for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining."

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[3] Section 7114(b)(4) provides that the "duty of an agency and an exclusive representative to negotiate in good faith shall include the obligation--

> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--
>
> (A) which is normally maintained by the agency in the regular course of business;
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining[.]"

However, since furnishing the home addresses of employees impinges to some degree on the personal privacy of employees, it is necessary to determine whether the Union has other effective means of communicating with the employees. Cf. Internal Revenue Service, Office of the District Director, Jacksonville District, Jacksonville, Florida, 2 A/SLMR 214, affirmed FLRC No. 72A-50, 2 FLRC 106 (1974). I agree with the General Counsel that the other means available to the Union are ineffective for the intended purpose of sending newsletters to all unit employees.[4] Dissemination of a newsletter or its contents to all unit employees by means of bulletin boards, new employees' orientation, officers and stewards on non-duty time, handbilling on non-duty time, telephone, and union meetings would be a cumbersome, inefficient, and a hit or miss proposition in terms of reaching all unit employees. The record does not reflect that the internal mail system can be used for mass mailings to all employees. The use of the U.S. mails would be the most reliable means of reaching all unit employees with a newsletter. Therefore, the home addresses of employees are "necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining."

Section 7114(b)(4) of the Statute requires an agency to furnish data only "to the extent not prohibited by law". The Freedom of Information Act, 5 U.S.C. § 552, as amended, provides that information in the possession of government agencies is available to the public except when the information is subject to one of the exemptions of the act. For example, personnel and similar files cannot be released where disclosure would constitute a clearly unwarranted invasion of personal privacy (5 U.S.C. § 552(b)(6)). Chapter 294 of the Federal Personnel Manual sets forth the instructions to all government agencies concerning the availability of information to the public under the Freedom of Information Act. Appendix C to Subchapter 7, "Guides for Responding to Labor Organization Requests for Names of Employees and Identifying Information," specifically states that agencies should not furnish labor organizations with employees' home addresses or telephone numbers since release of such information would constitute an "unwarranted intrusion into an employee's personal privacy". This instruction is labeled a "Guide" and must be treated as such. The Office of Personnel Management has otherwise recognized in publishing notices of its systems of records that a "routine use" of information in employee personnel records,[5] including home residences and mailing addresses, is disclosure "to officials of labor organizations recognized under 5 U.S.C. Chapter 71 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions." See FPM Supplement 711-1, Instruction 18 (August 10, 1978); 45 FR 78415, 78417 (November 25, 1980); 47 FR 16489 (April 16, 1982); 49 FR 36954, 36956 (September 20, 1984). Therefore, it is concluded that the disclosure of home addresses is not specifically prohibited by law or regulation.

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[4] With respect to the Union's alleged need for all home addresses in order to contact employees with active grievances, the Union officer and steward network at the shipyard should normally suffice to obtain the home addresses of employees with active grievances. This should be one of the first items of information obtained during the initial steward contact with a grievant. In those emergency situations where the information is not available to the Union and it is necessary for a steward to contact a grievant at home, it could be argued that the agency would be required to furnish the home address pursuant to section 7114(b)(4) for the effective processing of a grievance.

Since, as noted, the furnishing of employee home addresses would impinge to some degree on the employee's rights to privacy, the needs of a labor organization for data to effectively represent the unit employees must be balanced against the employee's right to privacy. The furnishing by the Respondent to the Union of employee home addresses for representational purposes would not constitute an unwarranted intrusion on the privacy of such employees. The Union is not an unknown, outside organization to such employees. It has a lawful relationship to them. There is no evidence that the Union would make any improper use of the home addresses or, in light of the Union's previous bad experience with outside organizations using their mailing list some years ago, that such organizations would be given access to the addresses again. The daily personal mail of most persons brings a steady barrage of unsolicited flyers, advertisements, and solicitations. Employees may have to spend a moment or two deciding whether to read the Union's newsletter or to toss it out along with other unwanted mail. Considering the needs of the Union to effectively communicate with unit employees, any intrusion on employees' personal privacy caused by the furnishing of home addresses to the Union for representational purposes is minimal and not unwarranted.

Respondent's conduct in refusing to grant the Union's request for the addresses of unit employees constitutes a failure to comply with section 7114(b)(4) of the Statute in violation of sections 7116(a)(1) and (8) and a refusal to bargain in good faith with the Union in violation of sections 7116(a)(1) and (5) of the Statute.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the

---

[5] The official personnel folder of each employee is under the jurisdiction and control of, and is part of the records of, the Office of Personnel Management, 5 C.F.R. § 293.303 (1984).

Authority hereby orders that the Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire shall:

1. Cease and desist from:

(a) Refusing or failing to furnish upon request of the Federal Employees Metal Trades Council, AFL-CIO, the addresses of all unit employees.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute.

(a) Upon request, furnish to the Federal Employees Metal Trades Council, AFL-CIO, the names and addresses of all unit employees.

(b) Post at its facilities at the Portsmouth Naval Shipyard, copies of the attached Notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Commander, Portsmouth Naval Shipyard and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to 5 C.F.R. section 2423.30 notify the Regional Director, Region I, Federal Labor Relations Authority, Boston, Massachusetts, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: April 25, 1985
Washington, DC

*U.S. G.P.O. 1987-181-223:60002

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Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 407 REPORT OF CASE DECISIONS December 4 ,1986

UNFAIR LABOR PRACTICE CASES

24 FLRA No. 31 (November 26, 1986)

Veterans Administration and Veterans Administration Medical Center, Lyons, New Jersey and American Federation of Government Employees, AFL-CIO, Local 1012, Case No. 2-CA-50428

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24 FLRA No. 33 (November 26, 1986)

Air Force Logistics Command, McClellan Air Force Base, California and Dora M. Solorio, an individual, Case No. 9-CA-40168

24 FLRA No. 36 (December 4, 1986)

Army and Air Force Exchange Service, Dallas, Texas and American Federation of Government Employees, AFL-CIO, Local 1345, Case No. 7-CA-50646

NEGOTIABILITY CASES

24 FLRA No. 30 (November 26, 1986)

National Treasury Employees Union and Internal Revenue Service, Denver District, Case No. 0-NG-1192

24 FLRA No. 34 (November 28, 1986)

American Federation of State, County and Municipal Employees, Local 2027 and ACTION, Case No. 0-NG-1326

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ARBITRATION CASES

24 FLRA No. 29 (November 26, 1986)

National Archives and Records Administration and American Federation of Government Employees, Council 236, Local 2928 (Cohen, Arbitrator), Case No. 0-AR-1128

24 FLRA No. 32 (November 26, 1986)

Internal Revenue Service, Louisville, District and National Treasury Employees Union (Thomson, Arbitrator), Case No. 0-AR-1232

24 FLRA No. 35 (December 4, 1986)

Internal Revenue Service, Cincinnati District Office and The National Treasury Employees Union, Chapter 9 (McDonald, Arbitrator), Case No. 0-AR-1146

Federal Labor Relations Authority

24 FLRA No. 29

National Archives and Records Administration and AFGE, Council 236, Local 2928
(Cohen, Arbitrator), Case No. 0-AR-1128

SUBJECT MATTER INDEX ENTRIES

ARBITRATION AWARDS, MODIFIED
AWARD CONTRARY TO THE STATUTE
7131(d)
ARBITRATION AWARDS, REMEDIES ORDERED BY ARBITRATORS
OFFICIAL TIME
CHANGE AWOL TO OFFICIAL TIME
PERSONNEL RECORDS
PERSONNEL RECORDS EXPUNGED OF SPECIFIED MATERIAL
ARBITRATION AWARDS, REVIEW OF, EXCEPTIONS ASSERTED IN APPEAL
AWARD CONTRARY TO THE FSLMR STATUTE
7131(d)
HOUSE REPORTS
H.R. REP. NO. 1403, 95TH CONG., 2ND SESS. (1978)
OFFICIAL TIME [7131]
ACTIVITIES NOT RELATED TO LABOR-MANAGEMENT MATTERS
OFFICIAL TIME MAY NOT BE AUTHORIZED UNDER 7131
POLICE ACTIONS RELATING TO DOMESTIC MATTERS
SENATE REPORTS
S. REP. NO. 969, 95TH CONG., 2D SESS. (1978)

STATUTE

7122(a)
7131(d)

DIGEST NOTES

The grievance in this case arose when the grievant, a union official, was charged with absence without leave (AWOL) for a period of time she was away from her worksite while assisting an employee who had been arrested by the police on a domestic matter. The arbitrator ruled that the grievant could spend a maximum of 35 percent of her time performing union duties under the provisions of the parties' agreement. He found no restriction in the agreement concerning where union representational duties could be performed and ruled that the agency had no right to inquire as to the nature or the location of the work to be done. Accordingly, the arbitrator found that the supervisor violated the parties' agreement when she denied

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the grievant official time and ordered that the AWOL charge be stricken and the time changed to official time with backpay as appropriate.

In its exceptions the agency contended that the portion of the award pertaining to the time spent by the grievant at the police station and the time spent traveling to the police station was contrary to section 7131(d) because it allows official time for a nonrepresentational purpose.

In modifying the award, the Authority held that the plain language of section 7131(d) is that official time may be negotiated only for an employee representing an exclusive representative or in connection with matters covered by the Statute. Examples of the proper use of official time for representational purposes include the investigation and attempted informal resolution of employee grievances, participation in formal grievances resolution procedures, attendance or preparation for meetings of committees on which both the labor organization and management are represented and discussion of problems in contract administration with management officials. However, there was no indication in the record that the grievant's use of official time for the purpose of assisting an employee in a private matter with the police was related to any labor-management activities under the Statute.

Federal
Labor Relations
Authority

24 FLRA No. 30

NTEU and IRS, Denver District, Case No. 0-NG-1192 (Decided November 26, 1986)

SUBJECT MATTER INDEX ENTRIES

CODE OF FEDERAL REGULATIONS
5 C.F.R. 735.205
EXAMINATIONS AND INVESTIGATIONS
EQUIPMENT (DESKS, LOCKERS, ETC.) ASSIGNED TO EMPLOYEES
PROHIBITION OF INSPECTION WITHOUT EMPLOYEE PRESENT
FACILITIES, EQUIPMENT AND SERVICES
INSPECTION OF DESKS AND LOCKERS ASSIGNED TO EMPLOYEES
PROHIBITION OF INSPECTION WITHOUT EMPLOYEE PRESENT
INFORMATION, EMPLOYEE AND UNION RIGHTS UNDER THE STATUTE
CONFIDENTIAL INFORMATION
COMPUTER USE FOR UNION BUSINESS
INTERNAL SECURITY PRACTICES, RESERVED MANAGEMENT RIGHT
EXAMINATIONS AND INVESTIGATIONS OF EMPLOYEES
FACILITIES AND EQUIPMENT
COMPUTERS
UNION USE FOR OFFICIAL UNION BUSINESS
PROCEDURE
FORUMS
FACTUAL ISSUES

STATUTE

7105(a)(2)(E)
7106(a)(1)

DIGEST NOTES

A proposal is negotiable that would permit union officials to use the activity's computer for official union business. The union stated that the use of the computer is necessary because typewriters are scarce and that the computer would be used like a typewriter for official union business only and not for internal union business. Contrary to the activity's contention, the proposal would not interfere with management's right to determine its internal security practices under section 7106(a)(1). Although the computer system does not have a security feature that would block access to confidential taxpayer information, the union officials that would be using the computer already have access to the same information as employees of the activity.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Moreover, since the computer would be used only for official union business, i.e. official business, the proposal does not conflict with 5 C.F.R. section 735.205, which prohibits use of Government property "for other than officially approved activities. (proposal 1)

A proposal is negotiable that would prevent management from examining the contents of an employee's locker without the employee present. The proposal is similar to a previous proposal (7 FLRA 304) that the Authority found negotiable which would prevent management from examining the contents of an employee's desk without the employee present. In that proposal the Authority held that it did not prevent management from determining its internal security practices under section 7106(a)(1) nor did it concern a method or means of performing work. (proposal 2)

Factual questions concerning the duty to bargain are not appropriately considered in a negotiability appeal. Such questions may be raised in other appropriate proceedings. (proposals 1 and 2)

Federal Labor Relations Authority

24 FLRA No. 31

VA and VA Medical Center, Lyons, N.J. and AFGE, Local 1012, Case No. 2-CA-50428
(Decided November 26, 1986)

SUBJECT MATTER INDEX ENTRIES

- NOTIFICATION OF UNION
  - CONDITIONS OF EMPLOYMENT
    - CONCEALMENT OF CHANGE
      - EFFECT ON TIME LIMITS TO FILE A CHARGE
- PERFORMANCE APPRAISAL SYSTEM
  - PERFORMANCE STANDARDS
    - IMPLEMENTATION
      - NOTIFICATION OF CHANGE TO UNION
- UNFAIR LABOR PRACTICES, PROCEDURE
  - TIME LIMITS
    - CONCEALMENT OF CHANGE IN CONDITIONS OF EMPLOYMENT
    - CONDUCT OCCURRING MORE THAN SIX MONTHS BEFORE FILING

STATUTE

7114(a)(2)(A)
7116(a)(1) and (5)
7118 and 7118(a)(4)(A)

DIGEST NOTES

A charge that the activity failed to bargain over the impact and implementation of a change in performance standards was dismissed by the Authority as untimely filed. The only employee in the clerk typist position in dispute -- who was also the union shop steward -- was notified of the change in her performance standards more than a year in advance of time the union filed its charge. Under section 7118(a)(4)(A), any charge alleging an unfair labor practice which is necessarily based on conduct or events which occurred more than 6 months before the filing of the charge is untimely filed.

The fact that there may have been a issue concerning notification of the proper union official is inapposite in the circumstances of this case. The union had never informed management of the union official to notify for changes in conditions of employment. More important the Authority has previous held that where the conduct on which the unfair labor practice is based occurred more than six months prior to the filing of the change, the charge is untimely under the provisions

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

of section 7118(a)(4)(A) unless it is established that the respondent agency prevented the person filing the charge from discovering the allegedly unlawful conduct within the 6-month limitations period by concealment or by failing to perform a duty owed to the charging party.

Federal Labor Relations Authority

24 FLRA No. 32

IRS, Louisville District and NTEU (Thomson Arbitrator), Case No. 0-AR-1232 (Decided November 26, 1986)

SUBJECT MATTER INDEX ENTRIES

DISCIPLINE OF EMPLOYEES
SUSPENSION
FOR MORE THAN 14 DAYS
AUTHORITY LACKS JURISDICTION TO REVIEW ARB. AWARDS
PROCEDURE
FORUMS
AUTHORITY LACKS JURISDICTION
REVIEW OF ARB. AWARDS
SUSPENSIONS FOR MORE THAN 14 DAYS
UNITED STATES CODE
5 U.S.C. 7512
5 U.S.C. 7703

STATUTE

7121(f)
7122(a)

DIGEST NOTES

The Authority dismissed exceptions to an arbitration award concerning the suspension of the grievant for 30 days. Review of arbitration awards relating to matters described in section 7121(f), including adverse actions under 5 U.S.C. section 7512, such as a suspension for more than 14 days, must be obtained in accordance with 5 U.S.C. section 7703. That is, review must be obtaining in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

24 FLRA No. 33

Air Force Logistics Command, McClellan Air Force Base, Cal. and Dora M. Solorio, an Individual, Case No. 9-CA-40168 (Decided November 26, 1986)

SUBJECT MATTER INDEX ENTRIES

AGENCY ULP (ALLEGED) 7116(a)(8)
  7131(c)
HOUSE REPORTS
  H.R. REP. NO. 95-1403, 95TH CONG., 2ND SESS. (1978)
OFFICIAL TIME [7131]
  AUTHORITY MANDATED PARTICIPATION IN ANY PHASE OF A PROCEEDING
    INVOLVEMENT OF AGENCY IN PROCEEDING NOT RELEVANT
    WHOSE BEHALF THE EMPLOYEE IS TESTIFYING IS NOT CONTROLLING
  TRAVEL AND PER DIEM
    AUTHORITY MANDATED PARTICIPATION
UNFAIR LABOR PRACTICES, PROCEDURE
  WITNESSES
    OFFICIAL TIME
    TRAVEL AND PER DIEM
UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
  OFFICIAL TIME, PROVIDE
  TRAVEL AND PER DIEM

STATUTE

7116(a)(1) and (8)
7118
7131(a) and (c)

DIGEST NOTES

The activity violated sections 7131(c), 7116(a)(1) and (8) when it failed to provide official time, travel and per diem expenses to an employee who appeared at an unfair labor practice hearing at the request of the General Counsel of the FLRA. The agency alleged that because the individual was not "participating for, or on behalf of, a labor organization", she was not entitled to official time, travel and per diem under section 7131(c). However, section 2429.13 of the Authority's rules and regulations provide for such payments. That regulation continues a long-standing practice that employees participating in third-party administrative proceedings in the Federal sector labor-management program receive official time for such participation. Section 7131(c) of the Statute was not intended to change that practice, as reflected by the statement in the

House Committee Report that, pursuant to that section, the Authority is empowered "to make determinations as to whether employees participating in proceedings before the Authority shall be authorized official time." H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58 (1978).

The activity also contended that it was not obligated to provide official time, travel and per diem because the employee testified at an unfair labor practice hearing in a matter in which the activity was not a charged party and had no interest. The cases cited by the activity apply to 7131(a) -- not 7131(c) of the Statute. The reasons for the limitations present in those cases do not apply to a witness called by the General Counsel of the FLRA to participate in proceedings before the Authority.

**Federal
Labor Relations
Authority**

24 FLRA No. 34

AFSCME, Local 2027 and ACTION, Case No. 0-NG-1326 (Decided November 28, 1986

SUBJECT MATTER INDEX ENTRIES	STATUTE
NEGOTIABILITY PROCEDURE	7105(a)(2)(E)
ALLEGATION OF NONNEGOTIABILITY	7117
WITHDRAWAL OF ALLEGATION	

DIGEST NOTES

Where the agency withdrew its allegation of nonnegotiability concerning the union's proposal, there was no longer an issue as to whether the proposals are within the parties' duty to bargain.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

24 FLRA No. 35

IRS, Cincinnati District
Office and NTEU, Chapter 9
(McDonald, Arbitrator), Case
No. 0-AR-1146 (Decided
December 4, 1986)

SUBJECT MATTER INDEX ENTRIES | **STATUTE**

- ARBITRATION AWARDS, REMEDIES — 7106(a)(2)(A)
  - BACKPAY — 7122(a)
- ARBITRATION AWARDS, EXCEPTIONS ASSERTED IN APPEAL
  - AWARD CONTRARY TO APPLICABLE LAW
    - 5 U.S.C. 5596 [BACK PAY ACT]
  - AWARD CONTRARY TO THE FSLMR STATUTE
    - 7106(a)(2)(A)
- BACKPAY
  - CRITERIA FOR BACKPAY AND RETROACTIVE PROMOTIONS
    - "BUT FOR" TEST
    - UNWARRANTED OR UNJUSTIFIED PERSONNEL ACTION
  - FURLOUGH
- LAYOFF, RESERVED MANAGEMENT RIGHT [7106(a)(2)(a)]
  - REDUCTION IN FORCE
    - INADEQUATE NOTICE UNDER THE PARTIES' AGREEMENT
- NOTIFICATION OF UNION
  - COLLECTIVE BARGAINING AGREEMENT PROVISIONS
    - FURLOUGHS
- REDUCTION-IN-FORCE
  - FURLOUGH / TEMPORARY REDUCTION-IN-FORCE
    - ADVANCE NOTIFICATION REQUIRED BY PARTIES' AGREEMENT
- UNITED STATES CODE
  - 5 U.S.C. 5596 [BACK PAY ACT]

DIGEST NOTES

A group grievance was filed contending that the activity failed to provide five days advance notice of a furlough as required by the parties' collective bargaining agreement. The arbitrator ruled that the activity could have given five days advance notice and that by not doing so the activity violated the parties agreement. As his award, the arbitrator ordered the activity to reimburse the grievants at their straight-time rate for the days for which they were not provided advance notice of their furlough.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

In one of its exceptions the agency contended that the award was contrary to the Back Pay Act, 5 U.S.C. section 5596 because the arbitrator failed to make the requisite findings to support the award of backpay. The Authority held that this exception constituted nothing more than disagreement with the arbitrator's findings of fact and with his reasoning. The arbitrator's interpretation of the agreement as imposing a mandatory requirement for five days notice when possible constitutes a finding by an appropriate authority as required by the Back Pay Act. Also the arbitrator made the required finding under the Back Pay Act that the activity's failure to give the grievants five days notice directly resulted in their not working for the days following furlough that they would have otherwise worked and received compensation but for inadequate notice.

In is second exception, the agency contended that the award violated management's right to layoff under section 7106(a)(2)(A). The Authority held that the award in no way prevented the activity from furloughing or laying off employees. Rather, the award only enforced the activity's contractual obligation to give employees five days advance notice of furlough "whenever possible". Advance notice of a reduction-in-force or furlough is a negotiable procedure under section 7106(b)(2).

Federal
Labor Relations
Authority

24 FLRA No. 36

Army and Air Force Exchange Service, Dallas, Tex. and AFGE, Local 1345, Case No. 7-CA-50646 (Decided December 4, 1986)

SUBJECT MATTER INDEX ENTRIES

AGENCY ULP (ALLEGED) 7116(a)(5)
  INFORMATION
AGENCY ULP (ALLEGED) 7116(a)(8)
  7114(b)(4)
EXAMINATIONS, INTERVIEWS AND INVESTIGATIONS
  INFORMATION
GRIEVANCE PROCEDURE, NEGOTIATED
  INFORMATION NECESSARY TO DECIDE WHETHER TO SEEK ARBITRATION
INFORMATION, EMPLOYEE AND UNION RIGHTS UNDER THE STATUTE
  CHARGING UNION FOR THE INFORMATION
  NECESSITY OR RELEVANCE FOR FULL AND PROPER DISCUSSION
    DISCIPLINE
      INFORMATION NOT AVAILABLE TO MANAGEMENT OFFICIALS
  TYPES OF INFORMATION SOUGHT
    EXAMINATION, INTERVIEWS OR INSPECTIONS
      CASH REGISTER TAPES
      VIDEO-TAPE SURVEILLANCE OF EMPLOYEES
UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
  INFORMATION TO BE PROVIDED UNION

STATUTE

7101(b)
7114(b)(4) and (b)(4)(B)
7116(a)(1), (5) and (8)
7118 and (a)(7)

DIGEST NOTES

A copy of a video-tape that was made in the covert surveillance of a cashier, was both relevant and necessary under section 7114(b)(4) for the union to discharge its representational function. Each cash register had a red light that came on if an item was not properly recorded by an electronic scanner. Cashiers were instructed to run each merchandise item over the scanner until the red light was cleared or to manually enter the code or price of the item. Following review of one video tape supplied by agency electronic surveillance specialists, activity management disciplined a cashier for under-ringing merchandise by not properly using the electronic scanner that recorded each item and its price. The

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

union believed that the red light was either difficult to see or did not come on and therefore sought to determine whether or not the cashier was aware that an item placed on the scanner had not actually been picked up by the scanner.

Although the union had been shown the video tape, it was entitled to a copy of the tape, without charge, upon its request. The activity permitted the union to view only a short 30 second segment of the video tape and only in the presence of various management officials, which prevented detailed and careful analysis; inhibited frank and open discussion by union representatives; afforded no opportunity for the union to show the video tape to other necessary representatives and employees to evaluate the procedures shown; to correlate visual transaction with cash register tape entries; or, indeed, to evaluate the presumed identity of the cashier as the person on the tape. Accordingly, the activity violated sections 7116(a)(1), (5) and (8) by not providing a copy of the video tape to the union without charge when requested.

The activity did not have an obligation under 7114(b)(4)(B) to provide the union with all video tapes made by agency video surveillance specialists of suspected cashier misconduct. The agency surveillance specialists made eight (8) covert tapes of a cashier's performance but supplied activity management with only one of those tapes which management then used as a basis for its disciplinary action. The tapes that were not available to nor used by management in reaching its decision to discipline the cashier were not relevant to the union's representational function. Accordingly, the agency did not violate sections 7116(a)(1), (5) and (8) for refusing to provide the union with all requested tapes.

24 FLRA No. 29

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL ARCHIVES AND
RECORDS ADMINISTRATION

Agency

and Case No. 0-AR-1128

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 236, LOCAL 2928

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on an exception to the award of Arbitrator Gerald Cohen filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance in this case arose when the grievant was charged with absence without leave (AWOL) for a period of time in which she was away from her worksite at the Winnebago Avenue office. The grievant was a Union official entitled under the agreement to spend 35 percent of her time "to perform [her] official representational duties." On the day in question, she told her supervisor at 7:30 a.m. that she would be using official time for Union duties; the supervisor agreed to release her at that time. The grievant worked on Union business for approximately an hour and a half at the Winnebago Avenue worksite and then prepared to leave the building to go to the Union office at the Page Avenue worksite. Before she left, another employee was arrested by the police in connection with a domestic matter and taken to the police station. The grievant left the Winnebago Avenue building at the same time as the police. As she was leaving, her supervisor ordered her not to leave and warned that if she did she would be charged annual leave or AWOL. The grievant left the building despite the supervisor's warning and went to the police station where she assisted the arrested employee. The grievant then went to the Page Avenue Union office where she performed Union representational duties until the afternoon. The grievant refused to take annual leave and was charged with AWOL for the time spent away from the building.

The matter was submitted to arbitration. The Arbitrator stated the issues to be: (1) whether the Agency violated the national agreement by its procedure for granting official time for Union representation, and (2) whether the Agency violated the agreement by charging the grievant with AWOL. The Arbitrator ruled that the Agency had agreed that the grievant could spend a maximum of 35 percent of her time performing Union duties and as a result had relinquished a portion of its right to control her activities. He stated that Union representatives were responsible for using the official time allotted them wisely and that if official time was abused, the correction of the abuse lies with the Union. He found that the Agency's right to deny official time under the agreement arises when official time is requested but cannot be granted because of workload considerations or because there is no available employee to replace the Union representative. He found no restriction in the agreement concerning where Union representational duties could be performed and ruled that the Agency had no right to inquire as to the nature or the location of the work to be done. The Arbitrator found as fact that the grievant requested and was granted official time and he ruled that the supervisor violated the agreement when she later denied the grievant permission to leave the Winnebago Avenue site. As his award the Arbitrator sustained the grievance and ordered the AWOL charge stricken and the time charged to official time with backpay as appropriate.

III. AGENCY EXCEPTION

The Agency filed an exception to that portion of the award which pertains to the time spent by the grievant at the police station and the time spent traveling to the station. The Agency contends that this portion of the award is contrary to section 7131(d)*/ of the Statute because it allows official time for a nonrepresentational purpose. The Agency contends that representing an employee in a police matter does not constitute a grievance, arbitration or other contract administration matter. The Agency also excepts to the Arbitrator's ruling that the grievant had the right to use official time wherever she wished notwithstanding the supervisor's objections and contends in this regard that the award fails to draw its essence from the agreement.

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*/ 5 U.S.C. § 7131(d) provides:

> (d) Except as provided in the preceding subsection of this section --

(Continued)

IV. ANALYSIS AND CONCLUSION

We agree with the Agency's contention that the Arbitrator's award is contrary to law, specifically section 7131(d) of the Statute. The plain language of that section is that official time may be negotiated only for an employee representing an exclusive representative or in connection with matters covered by the Statute. The legislative history of the Statute confirms that official time negotiated under section 7131(d) is to be used for labor-management relations activity. See H.R. Rep. No. 1403, 95th Cong., 2d Sess. 59 (1978), reprinted in Committee on Post Office and Civil Service, House of Representatives, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute of 1978, Committee Print No. 96-7, at 705 (1979) (Legislative History); S. Rep. No. 969, 95th Cong., 2d Sess. 112, 113 (1978), Legislative History at 772, 773. Examples of the proper uses of official time for representational purposes include the investigation and attempted informal resolution of employee grievances, participation in formal grievance resolution procedures, attendance or preparation for meetings of committees on which both the labor organization and management are represented and discussion of problems in contract administration with management

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(Continued)

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

officials. S. Rep. No. 95-969 at 113. *See also Social Security Administration and American Federation of Government Employees, AFL-CIO, Local 3231*, 19 FLRA No. 109 (1985) at n.2.

Consistent with the Statute, agencies and labor organizations may negotiate amounts of official time which are reasonable, necessary and in the public interest. The official time must be used for labor-management purposes, however. In the present case, the Arbitrator ruled that the Agency had no right to restrict the grievant's use of official time once it had determined that it was not constrained by such matters as workload considerations and had granted the time. However, there is no indication in the record that the grievant's use of official time for the purpose of assisting an employee in a private matter with the police was related to any labor-management activities under the Statute. The grievant's supervisor acted within her authority when she challenged the grievant's use of previously granted official time because she suspected that the time was not to be used for labor-management purposes. If the grievant believed that she was improperly denied official time, her recourse was to obey the order and then file a grievance. *See, for example, Bigelow v. Department of Health and Human Services*, 750 F.2d 962, 965 (Fed. Cir. 1984); *Department of the Air Force, McGuire Air Force Base and American Federation of Government Employees, Local No. 1778*, 6 FLRA 283 (1981). Consequently, we find that insofar as the award sustained the grievance and ordered backpay for the time spent by the grievant traveling to and at the police station, it is deficient as contrary to section 7131(d) of the Statute.

V. DECISION

The award is modified by setting aside that portion which pertains to the AWOL charge and orders backpay for the time spent by the grievant in traveling to and at the police station.

Issued, Washington, D.C., November 26, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL TREASURY EMPLOYEES UNION

Union

and

Case No. O-NG-1192

INTERNAL REVENUE SERVICE,
DENVER DISTRICT

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of two Union proposals.[1] For the reasons which follow, we find that both proposals are within the duty to bargain.

II. Background

The proposals at issue in this case arose when the parties were renegotiating their local Automated Collection Site (ACS) Agreement. The ACS utilizes a Zilog computer system which stores information on delinquent taxpayer accounts and the results of investigations of taxpayers. The employees involved in this case work at a "call site" which attempts to contact delinquent taxpayers and to investigate their assets. The Agency indicates that all employees use the computer system both to retrieve information about taxpayers and to document actions taken on cases. Agency Statement of Position at 2.

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[1] The Union withdrew its appeal of the remaining proposals originally submitted. They will not be considered further here.

III. Union Proposal 1

> Section 2. The Employer will provide a password for use of Zilog for official union business.

A. Positions of the Parties

The Agency claims that Union Proposal 1 is in violation of the national ACS agreement and not within the duty to bargain under the reopener clause because there is no provision in the national agreement delegating authority to parties on the local level to negotiate over the issue of union use of the computer system. The Agency further argues that providing the Union with access to the computer system would interfere with its right to determine its internal security pursuant to section 7106(a)(1) of the Statute because it would require giving the Union access to confidential taxpayer information as well as word-processing functions of the system. Finally, the Agency argues that the proposal conflicts with a Government-wide regulation, 5 CFR § 735.205, which prohibits use of Government property "for other than officially approved activities," insofar as the proposal is meant to allow use of computer terminals for internal union business.

The Union asserts that the proposal concerns an issue which is a proper subject for bargaining in the local ACS agreement because it is local in effect and the national ACS permits such issues to be resolved at the local level. The Union further argues that the proposal does not conflict with the Agency's right to determine its internal security because the Union employees who would gain access to confidential taxpayer information from access to the Zilog computer already have access to such information through their jobs. In addition, the Union denies that its proposal would conflict with 5 CFR § 735.205, stating that the proposal is intended to authorize use of the computer system for "official" union business, which it says was meant to exclude "internal" union business. The Union states that it proposes to make the same use of the computer that it makes of typewriters in other Denver District offices and that the proposal is necessary because typewriters are scarce.

B. Analysis

The question raised by the Agency regarding whether Proposal 1 is a proper subject for bargaining under the reopener clause cannot be resolved in this decision. The record in this case fails to provide any basis for substantiating the agency's assertions. Further, to the extent that there are factual issues in dispute between the parties concerning the duty to bargain in the specific circumstances of this case, these issues may be raised in other appropriate proceedings. See, for example, American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force, Base, Michigan, 14 FLRA 302 at 306, n. 6 (1984).

Proposal 1 reflects the increased automation of Government work and the increased efficiencies of agency operations realized by that automation. There are, however, corresponding responsibilities which result from the automation, primarily responsibilities relating to the internal security of automated systems and access to their use. The legitimate security, privacy, and mission accomplishment concerns of management must be recognized, as well as the benefits to the Union of access to such systems.

In the instant case, the Union asserts without contradiction, that "typewriters are scarce at ACS." Union Petition for Review at 3. The Agency counters that it "does not have the capabilities to ensure limited access to only the word processing functions," and that the proposal would provide the Union with access to "confidential taxpayer information." Agency Statement of Position at 6. The Agency does not, however, dispute the Union's assertions that the Union officials who would use the password are employees of the Agency who "already have access to confidential taxpayer information." Union Response at 2. Insofar as it appears from the record, the Union would not gain any additional access to taxpayer information by obtaining a password enabling it to use the word processing functions of the computer system. For this reason, the instant case is distinguishable from the cases concerning internal security practices cited by the Agency, National Federation of Federal Employees, Local 1827 and Defense Mapping Agency, Aerospace Center, St. Louis Air Force Station, Missouri, 16 FLRA 791 (1984), and National Labor Relations Board Union and General Counsel of the National Labor Relations Board, 5 FLRA 696 (1981). Defense Mapping Agency concerned agency attempts to prevent the disclosure of classified information to the public which employees learned in the course of their jobs. National Labor Relations Board concerned a proposal which would have allowed employees to have access to confidential information which otherwise would not have been available to them.

The Authority has previously recognized the negotiability of proposals concerning a union's use of agency facilities for the conduct of official union business. See, for example, American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 603 (1980) (Proposal II), enforced sub nom. Department of Defense v. FLRA 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945 (1982). Our holding in the instant case is a continuation of that line of precedent. It must be a careful, case-by-case continuation in light of concerns for the integrity of automated systems containing information such as that in this case.

Finally, we turn to the question of whether the proposal conflicts with 5 CFR § 735.205, as claimed by the Agency, because it is intended to allow use of the computer for internal union business. The proposal states that the computers will be used for official union business. The Union states that the proposal was intended to exclude internal union business. The Union's statement as to the meaning is consistent with the wording of the proposal and we adopt it for the purpose of this decision. In the related context of official time for employees representing a union, we have held that activities involving labor-management contacts, as well as preparation for them, are not internal union business. National Association of Government Employees, SEIU, AFL-CIO and Veterans Administration Medical Center, Brockton/West Roxbury, Ma., 23 FLRA No. 74, slip op. at 2-3 (1986). The Agency does not claim, nor does the record establish, that use of Government property in connection with carrying out official Union business would be prohibited by 5 CFR § 735.205.

Conclusion

The Agency has not established that Union Proposal 1 conflicts with 5 CFR § 735.205 or with the Agency's right to determine its internal security under section 7106(a)(1). Therefore, it is within the duty to bargain.

IV. Proposal 2

> Section 4. Each employee will be provided with a locker for his/her personal effects. Management will not inspect these without good reason. If it becomes necessary to inspect a locker it will be done with at least two people

present, one of which is the affected employee or his/her designated union representative.

A. Positions of the Parties

The Agency's sole contention regarding Proposal 2 is that it involves matters which were not delegated to local bargaining by the national ACS agreement. The Union argues that the issue presented by the proposal is properly negotiated at the local level because, while the provision of lockers themselves was negotiated at the national level, the question of procedures to be followed in Agency inspection of lockers is a local issue which has surfaced since the negotiation of the National ACS agreement. The Union also argues that it has not waived it's right to negotiate over the proposal.

In addition, the Union states that the proposal is negotiable, consistent with Authority precedent holding that proposals requiring that employees be permitted to be present during a search of their work area are negotiable. National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 9 FLRA 983 (1982); National Treasury Employees Union and NTEU Chapter 61 and Department of the Treasury, Internal Revenue Service, Albany District, New York, 7 FLRA 304 (1981).

B. Analysis

As stated in connection with the discussion of Proposal 1, the factual questions concerning the duty to bargain are not appropriately considered in a negotiability appeal. The record in this case fails to provide any basis for substantiating the Agency's assertions. Further, to the extent that there are factual issues in dispute between the parties concerning the duty to bargain in the specific circumstances of this case, these issues may be raised in other appropriate proceedings. See Wurtsmith Air Force Base, 14 FLRA at 306 n.6. Thus, the Authority will not consider further the Agency's arguments about whether Union proposal 2 concerns an appropriate subject for bargaining.

Turning to the substance of the proposal, we find, in agreement with the Union, that it is negotiable. In Internal Revenue Service, Albany District, New York, 7 FLRA 304, the Authority found that a similar proposal which prevented management from examining the contents of an employee's desk without the employee being present was negotiable. The Authority concluded in that case that the proposal did not prevent the agency from determining its internal security practices under section 7106(a)(1) of the Statute nor did it concern a method or means of performing work. Similarly, for the reasons set forth more fully in Internal Revenue Service, Albany District, New York, Union proposal 2 is negotiable.

V. Order

The Agency must, upon request (or as otherwise agreed to by the parties) bargain concerning the Union's proposals.[2]

Issued, Washington, D.C. November 26, 1986.

Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[2] In finding these proposals to be within the duty to bargain, the Authority makes no judgment as to their merits.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION AND
VETERANS ADMINISTRATION MEDICAL
CENTER, LYONS, NEW JERSEY

Respondent

and Case No. 2-CA-50428

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1012

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the Charging Party (the Union) to the attached decision of the Administrative Law Judge. The Respondent filed an opposition to the exceptions. The complaint alleged that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute when in or around April 1984, it unilaterally changed the performance standards for a clerk typist position in one of the divisions of the medical center without notifying the designated representative of the Union and affording the Union an opportunity to bargain over the impact and implementation of the new standards. The complaint further alleged that the Union first became apprised of the change in or around April 1985.

II. Background and Judge's Conclusion

The Judge concluded that the charge was untimely under section 7118 of the Statute. Specifically, he found that in April 1984, Charlene Cozart, the only employee in the clerk typist position in dispute and at all relevant times a shop steward of the Union, was fully informed of the change in the performance standards for the position and was given a copy of the new standards. He further found that in October 1984 at a mid-term performance evaluation conference, Ms. Cozart was evaluated under the new standards and again given a copy of the new standards. The Judge in particular noted Ms. Cozart's status as a shop steward and emphasized that, as a steward and representative of the Union, she had very direct knowledge of the change in her performance standards. Accordingly, he decided that the Respondent's conduct did not preclude the Union, the charging party, from filing the charge within six months after the change in 1984 of the performance standards for the clerk typist position and that the July 29, 1985 charge was therefore untimely. He accordingly recommended that the complaint be dismissed.

III. Positions of the Parties

In its exceptions the Union principally argues that the Judge erred by concluding that the charge was untimely. The Union maintains that the charge was filed within two weeks of the time that the Union discovered the change in the performance standards. The Union also argues that the Judge erred by permitting the Respondent's assistant personnel officer, Alan Osman, to testify without having been sequestered. The Union also disputes certain credibility findings of the Judge.

In its opposition the Respondent maintains that the Judge properly concluded that the charge was untimely. The Respondent also asserts that the testimony of Mr. Osman was proper. The Respondent maintains that the Judge specifically and appropriately ruled that each party was permitted to have one person serve as a technical advisor who could testify without having been sequestered and that Mr. Osman was designated by the Respondent. The Respondent further disputes the Union's objections to the credibility findings of the Judge.

IV. Analysis and Conclusions

We agree with the Judge and reject the exceptions of the Union. We reject the Union's contention concerning the testimony of Mr. Osman and adopt the Judge's ruling. We also find no basis for reversing the Judge's credibility findings. See, for example, Department of the Air Force, Lowry Air Force Base, Denver, Colorado, 22 FLRA No. 47 (1986), slip op. at 8 n.2. Thus, we adopt for the reasons stated by the Judge his finding and conclusion that the charge was untimely and his order recommending that the complaint be dismissed.

V. ORDER

The complaint in Case No. 2-CA-50428 is dismissed.

Issued, Washington, D.C., November 26, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(24 FLRA No. 31)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

VETERANS ADMINISTRATION and
VETERANS ADMINISTRATION
MEDICAL CENTER, LYONS,
NEW JERSEY

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT, AFL-CIO,
LOCAL 1012

Charging Party

. . . .

Case No. 2-CA-50428

Leslie S. Vincent, Esquire
For the Respondent

Susan M. Roche, Esquire
For the General Counsel

Mr. George Hall
For the Charging Party

Before: William B. Devaney
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.,[1] and the

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, e.g., Section 7116(a)(5) will be referred to, simply, as "§ 16(a)(5)."

Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns an asserted unilateral change of working conditions "In or around April 1984 . . . by changing the performance standards for the VRT/ITP Clerk Typist without notifying designated representative and affording it an opportunity to bargain over the impact and implementation of the new standards." (Complaint, G.C. Exh. 1(c), Par. 6). The charge was not filed until July 29, 1985, well over a year after the asserted unilateral change, and the threshold, and controlling, question is whether the alleged unfair labor practice is barred by § 18(a)(4)(A) of the Statute. Although the Complaint alleges that, "The Charging Party [Local 1012] first learned of the change referred to in paragraph 6 . . . in or around April 1985" (Complaint, G.C. Exh. 1(c), Par. 7), Respondent asserts that the change of performance standards was discussed with the shop steward in April, 1984, indeed that the shop steward, who was also the VRT/ITP Clerk Typist, and the only VRT/ITP Clerk Typist, typed the new performance standards in April, 1984, not only for her position as VRT/ITP Clerk Typist but also the new performance standards for therapists who are outside the bargaining unit and for therapy assistants who are in the bargaining unit, and that the shop steward was given a copy of her new performance standards in April, 1984, to retain. Respondent further asserts that the shop steward-clerk typist was provided a copy of the new performance standard on October 31, 1984, during a mid-term appraisal conference, which was nine months prior to the date the charge was filed. For reasons more fully set forth hereinafter, I find that this proceeding is barred by § 18(a)(4)(A) of the Statute.

This case was initiated by a charge filed on July 29, 1985 (G.C. Exh. 1(a)); the Complaint and Notice of Hearing issued on October 7, 1985 (G.C. Exh. 1(c)); and set the hearing for December 9, 1985, pursuant to which a hearing was duly held on December 9, 1985, in New York City before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument, which counsel for Respondent exercised but General Counsel waived. At the close of the hearing, January 9, 1986, was fixed as the date for mailing post-hearing briefs and each party timely mailed an excellent brief, received on, or before, January 10, 1986, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. On, or about, April, 1983, Ms. Charlene Cozart, who had been employed at VAMC Lyons since about 1978 (Tr. 17), became the Clerk/Typist of the Vocational Rehabilitation Therapy/Incentive Therapy Program (VRT/ITP) which is a division within the Rehabilitation Medicine Service (RMS) Department at Veterans Administration Medical Center (VAMC) Lyons, New Jersey (Tr. 16-17). Ms. Cozart is the only Clerk Typist in VRT/ITP (Tr. 97); but there a total of ten employees in VRT/ITP, the other nine being therapists, who are outside the bargaining unit, and therapy assistants, who are bargaining unit employees (Tr. 97). There are about 30 employees in RMS (Tr. 28). American Federation of Government Employees, AFL-CIO, Local 1012 (hereinafter referred to as the "Union") represents about 1200 bargaining unit employees at VMAC Lyons (Tr. 59).

2. Mr. Ferdinand Hammonds is Chief, VRT/ITP, and supervises the ten people in VRT/ITP, including Ms. Cozart (Tr. 64, 65). On April 6, 1984, Mr. Hammonds met with Ms. Cozart to discuss her performance appraisal for the 1983-84 evaluation period. Mr. Hammonds gave Ms. Cozart an "Outstanding" rating for the 1983-84 period (Tr. 20, 67; Jt. Exh. 2). Mr. Hammonds also recommended Ms. Cozart for a special achievement award of $273.00 [2%] (Res. Exh. 1). Sometime in 1984, after April 6, 1984, Ms. Cozart received a step increase from GS-4, Step 4 to GS-4, Step 5 (see, Res. Exhs. 1 and 3).

3. Ms. Cozart in April, 1984, was shop steward,[2] a fact well known by Mr. Hammonds who testified that Ms. Cozart was very active as a steward (Tr. 71), with which Ms. Cozart fully agreed (Tr. 43).

4. In April, 1984, the performance standards for the VRT/ITP Clerk Typist position, i.e., the performance standards for Ms. Cozart's then and present position (Tr. 16, 17, 68), were changed. Ms. Cozart was, and is, the only

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[2] At some point, Ms. Cozart was elected Secretary-Treasurer of Local 1012 and became a member of the Executive Board; however, she testified, in December, 1985, that she had held that position one year (Tr. 19). As the record fails to show that she was Secretary-Treasurer either in the March-April or October, 1984, time frame, I shall assume that she was only shop steward at such times.

Clerk Typist in VRT/ITP[3] (Tr. 18, 97). Mr. Hammonds testified that the reason for the change was the very large number of awards given for the 1983-84 rating period and the desire of administration to make the performance standards more stringent (Tr. 69). Accordingly, Mr. Hammonds changed the numerical standards on most, but not all, of the standards. For example: under 1, "Primary Clerical Activity" A "Meets Criteria", which had been 85% was increased to 90%, "Far Exceeds" remained 95%; B through E, "Meets Criteria", which had been 85% was increased to 90%, "Far Exceeds" was increased from 95% to 98%; under 2. "Transcription" A, "Meets Criteria" was increased from 85% to 90% and "Far Exceeds" was not changed; B "Meets Criteria" was increased from 85% to 90% and "Far Exceeds" was increased from 95% to 98%; 3. "Reports" A and B were not changed; and a new category "Safety & Preventive Maintenance" was added (Jt. Exh. 3, compare with Jt. Exh. 2).

The 1983-84 Performance Standards had not contained a numerical rating for "Exceeds", nor did the 1984-85 Performance Standards as prepared by Mr. Hammonds contain a numerical rating for "Exceeds" (Tr. 79); however, a personnel clerk later added a numerical rating for "Exceeds" on the 1984-85 Performance Standards (Tr. 69, 81). Notwithstanding that the 1983-84 Standards, and the 1984-85 Standards as prepared by Mr. Hammonds, did not give a numerical rating for "Exceeds", the "Level of Achievement" had always provided four categories: Failed to Meet; Met; Exceeded; and Far Exceeded (see, also, Jt. Exh. 1, Art. 32, Section 5), and I fully agree with Mr. Hammonds that, whether defined or not, "Exceeded" plainly meant that level of achievement between "Met", which was defined, and "Far Exceeds", which was defined.[4]

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[3] There are other Clerk Typists in RMS (Tr. 18).

[4] The issue is not before me, but pure logic would dictate that all performance above "Meets Criteria", but below "Far Exceeds" must fall in the category of "Exceeds"; however, somewhat strangely, "Exceeds" was placed higher rather than, simply, being better than "Meets Criteria". For example, where "Meets Criteria" is 90%, "Exceeds" is defined either as 92% or 95% (rather than any level of achievement greater than 90%) but less than the defined level for "Far Exceeds Criteria". Nevertheless, since Ms. Cozart met the standard for "Exceeds", I express no opinion concerning the propriety of Respondent's definition of "Exceeds".

Ms. Cozart typed the new performance standards for her VRT/ITP Clerk Typist position in April, 1984 (Tr. 70, 110). Indeed, Mr. Hammonds testified without contradiction that in April, 1984, Ms. Cozart also typed new performance standards for the other nine employees under his supervision in VRT/ITP (Tr. 70). Ms. Cozart, while admitting that she typed the performance standards for her VRT/ITP Clerk Typist position in April, 1984, asserted she, ". . . wasn't aware that it was the change . . . I didn't have them both there at the same time." (Tr. 110). Mr. Hammonds, on the other hand, testified that, ". . . we [Mr. Hammonds and Ms. Cozart] discussed those somewhat at length, because I wanted to be assured of the fact that she recognized the difference between the '83 and '84 to make sure she carried the changes over into the new standards . . . I discussed the differences with her, yes." (Tr. 70). On cross examination, Mr. Hammonds further stated, "She had the two of them together, [the 1983-1984 appraisal levels and the 1984-1985 appraisal levels] and she was the one who was going to do the work. I had to show her the difference between the two, yes, she had both of those accessible to her. They were discussed, yes, the differences were discussed in detail." (Tr. 88). I fully credit the testimony of Mr. Hammonds, who was a wholly credible witness and whose testimony was, ultimately, corroborated in critical respects by Ms. Cozart's admissions, while I found Ms. Cozart's testimony in this regard to be neither credible nor consistent. First, as to the date she typed the new performance standards for her VRT/ITP Clerk Typist position, she first asserted it was March, 1985 (Tr. 23, 44); then ". . . sometime prior to March, and I don't want to say an exact date, because I don't know an exact date" (Tr. 45), and finally admitted it was April, 1984 (Tr. 110, 111). Second, the performance standards for 1983-84 and for 1984-85 contain lengthy statements under each Section which are identical. It is highly improbable that the text would have been hand written by Mr. Hammonds and even more improbable that the format would have been so identical unless the 1984-85 performance standard had been copied, either manually or from stored memory, and in either case the 1983-84 percentages would have been present. Third, the new "Safety & Preventive Maintenance" section, added to the 1984-85 performance standards, appears clearly to have been added to the last page of the 1983-84 standards. Fourth, Ms. Cozart avoided any reference to her typing of new performance standards for nine other employees of VRT/ITP in April, 1984, despite the fact that, after Ms. Hammonds so testified, she was recalled and testified concerning other matters. Fifth, Ms. Cozart admitted that, as Mr. Hammonds had testified (Tr. 70-71), she had a copy of the 1983-84 standards (Tr. 110-111) and got a copy of the 1984-85 standards (Tr. 111) which she asserted, ". . . disappeared." (Tr. 111).

5. On October 31, 1984, Mr. Hammonds met with Ms. Cozart for a mid-term evaluation conference (Tr. 25, 73). Mr. Hammonds testified, in part, that on October 31, 1984,

> "I told her that I had reviewed her standards, gave her a copy of the standards and suggested that she look at them if she didn't have her copy available, which she didn't, and I told her that I had reviewed them and I found that was Exceeded in all levels of her performance requirements." (Tr. 73-74).

On the same date, October 31, 1984, Mr. Hammonds wrote a memorandum to Ms. Cozart summarizing the appraisal conference in which he stated, in part, as follows:

> ". . .
>
> "2. At that time [10/31/84], I reviewed with you your performance during April 1, 1984 thru October 31, 1984, in all elements of your 'performance requirements;' also, I made suggestions as to how you may improve specific elements.
>
> "3. More specifically, you concurred with my appraisal of your exceeding all elements one (1) through five (5).[5/]" (Res. Exh. 2).

Mr. Hammonds testified that Ms. Cozart typed Respondent Exhibit 2 and that he, ". . . provided her a copy." (Tr. 75). Ms. Cozart denied that she received a copy of the October 31, 1984, "Summary of Appraisal Conference" (Res. Exh. 2); but Respondent's Exhibit 2 was received without objection. I fully credit Mr. Hammonds' testimony both as to his conversation with Ms. Cozart on October 31, 1984, and as to her typing Respondent Exhibit 2 and having been provided a copy.

[5/] This would appear to be an error as there were four elements: "Primary Clerical Duties"; "Transcription"; "Reports"; and "Safety & Preventative Maintenance" (See, Jt. Exh. 3, Section A [second page]) not five elements.

6. On April 17, 1985, Mr. Hammonds rated Ms. Cozart's level of achievement on each of the four elements as "Exceeds" and gave her an overall rating of "Highly Satisfactory" (By definition, to obtain an overall rating of "Outstanding", "All levels of achievement for each Key Responsibility/Task are designated as Far Exceeded." There was no change in the Overall Ratings Section (Section C) requirements - see, Jt. Exhs. 2 & 3). Joint Exhibit 3 shows that the performance plan review took place on April 17 (see, also, Tr. 83), at which time Mr. Hammonds testified, in part, that, "I told her that I had rated her as Exceeded, and she accepted those. She seemed to be pleased with it." (Tr. 83). Mr. Hammonds further testified that, ". . . after I had rated her Exceeded, I took it over to my supervisor, which he was the reviewer, and we reviewed it and jointly, we agreed that she should be recommended for an award for the second year in a row." (Tr. 83-84). On April 22, 1985, Mr. Hammonds recommended Ms. Cozart for a special achievement award of $291.56 (2% - the same percentage as in 1984), which was approved on April 23, 1985 (Res. Exh. 3). Although Mr. Hammonds had signed the appraisal on April 17, 1985, the recommendation for a 2% monetary award was added and Ms. Cozart signed the appraisal on April 22, 1985, and checked the block, "I do not wish to respond" (Jt. Exh. 3. last page).

7. Article 4, Section 5 of the parties' Agreement provides, in part, as follows:

> "Section 5 - Local Level Changes
>
> "Proposed changes affecting personnel policies, practices or conditions of employment which are initiated by local management at a single facility will be forwarded to the designated local official. . . ." (Jt. Exh. 1, Article 4, Section 5).

Article 6 of the parties' agreement provides, in part, as follows:

> "Section 3 - Notification of Union Officials
>
> "A. The Union will present management at each facility with an updated list of union officers and

> representatives annually. . . ." (Jt. Exh. 1, Art. 6, Section 3A).
>
> . . .
>
> "Section 6 - Notification of Changes in Conditions of Employment
>
> "The Agency shall notify the appropriate union official prior to changing conditions of employment which affect bargaining unit employees. . . ." (Jt. Exh. 1, Art. 6, Section 6).

Mr. Lee E. Whitaker, President of the Union, testified that "the designated local official" in Article 4, Section 5, meant the President (Tr. 50); however, Mr. Whitaker admitted that he had never given management overall notice in writing that when performance standards are going to be changed that the President was the designated representative to be notified (Tr. 59). Mr. Whitaker stated that five or six of the more than 25 services at VAMC (Tr. 103) had notified him of some type of change in performance standards (Tr. 59). Mr. Alan E. Osman, Assistant Personnel Officer (Tr. 101), testified that there is no designated union official to be given notice of any change in a performance standard by a supervisor (Tr. 102). Mr. Osman further testified that, when performance standards are to be changed by a supervisor, he had told the supervisor to give notice to the shop steward if there was a shop steward in that service, and if there were no shop steward in that service, to send it to the Union office (Tr. 104-105).

8. Although Mr. Hammonds was well aware that Ms. Cozart was the shop steward (Tr. 71), he conceded he never told her he was giving her notice of the change in performance standards as the shop steward or because she was the shop steward (Tr. 88; see, also Tr. 58).

Conclusions

In United States Department of Labor, 20 FLRA No. 34, 20 FLRA 296 (1985), the Authority considered § 18(a)(4)(A) and (B), and stated, in part, as follows:

> ". . . any charge alleging an unfair labor practice which is necessarily based on conduct or events which occurred more than 6 months before the filing of the

> charge is untimely under the provisions of section 7118(a)(4)(A) of the Statute, unless it is established that the respondent agency . . . prevented the person filing the charge from discovering the allegedly unlawful conduct within the 6-month limitations period by concealment or by failing to perform a duty owed to the charging party. . . ." (20 FLRA at 297).

The Authority further noted that,

> ". . . the House Committee Report accompanying H.R. 11280 stated with respect to section 7118(a)(4), which was ultimately enacted and signed into law without change, as follows:
>
> > "Subsection (a)(4) prohibits the issuance of a complaint based upon an unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority unless the person aggrieved was prevented from filing the charge because the agency or labor organization against whom the charge is made failed to perform a duty owed to the aggrieved person, or due to concealment. In addition, the concealment or failure to perform a duty must have prevented the discovery of the unfair labor practice within 6 months of its occurrence. [Emphasis added.] (footnote omitted)." (20 FLRA at 298).

See, also, United States Department of the Treasury, Internal Revenue Service and United States Department of the Treasury, Internal Revenue Service, Houston District, 20 FLRA No. 7, 20 FLRA 51 (1985).

Consequently, contrary to the position of the General Counsel and, somewhat at variance with the position of Respondent, although Respondent does assert that this proceeding is barred by § 18(a)(4)(A), timeliness of the charge in this case is governed by the provisions of "§ 18(a)(4) and by the Authority's admonition that, ". . . any charge alleging an unfair labor practice which is necessarily based on conduct or events which occurred more than 6 months before the filing of the charge [here, as the Complaint states, a unilateral change of working conditions in April, 1984, by changing the performance standards for the VRT/ITP Clerk Typist] is untimely . . . unless it is established that the . . . agency . . . prevented the person filing the charge from discovering the allegedly unlawful conduct within the 6-month limitations period by concealment or by failing to perform a duty owed to the charging party"; and further as the House Committee Report states, and as the Authority noted, ". . . the . . . failure to perform a duty must have prevented the discovery of the unfair labor practice within 6 months of its occurrence." Here, the record shows, and I have found, that the VRT/ITP Clerk Typist, Ms. Cozart, was fully informed of the change of her performance standards in April, 1984; that Ms. Cozart, who typed the new performance standards, was given both the prior performance standards (1983-84 standard) as well as the new (1984-85) appraisal levels. ". . . to make sure she carried the changes over into the new standards. . . ."; and Ms. Cozart was given a copy of the new standards to retain. Further, in April, 1984, like changes in the performance standards of the other nine employees in the VRT/ITP section were made and Ms. Cozart also typed the new performance standards for the other nine employees in the VRT/ITP section; the new requirements were explained to each of the other nine employees of VRT/ITP (therapy assistants, who are in the bargaining unit were notified in April, 1984; and those outside the bargaining unit were notified in May, 1984); and each was given a copy of the new standards (Tr. 70-71; 96-97).

To be sure, Ms. Cozart was shop steward; and, while it is conceded that Respondent never told her as shop steward that it was changing her, or the other nine employees', performance standards, there can be no doubt that she, as shop steward, well knew in April, 1984, of the changes of the performance standards in VRT/ITP. Again, on October 31, 1984, in a mid-term evaluation conference, Ms. Cozart, as an employee, was given a copy of the new, 1984-85, performance standards to review. Respondent, relying on decisions of the Authority, such as Veterans Administration, Veterans Administration Medical Center, Muskogee, Oklahoma, 19 FLRA No. 122, 19 FLRA 1054 (1985), asserts that, ". . . actual representation by an exclusive representative at a formal discussion is sufficient to demonstrate compliance with the requirement of section 7114(a)(2)(A) . . . although they [the representatives present] had not been notified in their capacities as union officials but rather as employees. . . ." (19 FLRA at 1056), and argues that, "This same philosophy can and should be carried over into a situation . . . where notice was given to an employee [who was also a union steward] about a change in her performance standards. . . ." (Respondent's Brief, p. 6). General Counsel, in essence, argues that notice of a change of a condition of employment must be given to the Union, qua Union, otherwise, ". . . the Union would have had no chance to bargain prior to implementation of the new standards" (General Counsel's Brief, p. 12) and asserts that cases such as: Veterans Administration, Veterans Administration Medical Center, Muskogee, Oklahoma, supra, and United States Department of Labor, Employment Standards Administration, 20 FLRA No. 2, 20 FLRA 5 (1985), are inapposite for the reason that, ". . . they involve formal discussions where Union officials attended even though the Union per se was not given formal notice of the meeting . . . This is distinguishable from a failure to give formal notice prior to a unilateral change. The purpose of a notice in that situation is to give the Union an opportunity to request bargaining over the change and to submit proposals if it so desires. . . ." (General Counsel's Brief, n. 13, pp. 12-13). General Counsel distinguishes United States Air Force v. Federal Labor Relations Authority, 681 F. 2d 466 (6th Cir. 1982) on the ground that, ". . . there the steward was the Union official designated to be notified of unilateral changes . . . At VAMC Lyons no such designation was ever made of Charlene Cozart.[6] . . ." (General Counsel's Brief, n. 13, pp. 12-13).

6/ While it is quite correct that Ms. Cozart was not designated to receive notice of unilateral changes, no overall notice had ever been given by the Union of the official to receive notice of any change. Article 4, Section 5 of the parties' Agreement provides that notice will be "forwarded to the designated local official" (Jt. Exh. 1, Art. 4, Sec. 5) while Article 6, Section 6, provides that "The Agency shall notify the appropriate union official prior to changing any condition of employment. . . .")Jt. Exh. 1, Art. 6, Sec. 6). It is not clear from the Agreement either why two different provisions address notice of changes or the significance of the difference in language. Perhaps, as the testimony of President Whitaker and Mr. Osman tends to suggest, Article 4, Section 5, governs across-the-board

(continued)

Although I agree with General Counsel that adequacy of notice for purposes of § 14(a)(2)(A) is to be distinguished from adequacy of notice of a change of conditions of employment, Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 19 FLRA No. 123, 19 FLRA 1085 (1985) (Activity notified the three on-duty employees and the union steward of a meeting; at the meeting. Activity announced a new lunch and break schedule. Held, actual representation of the exclusive representative at a formal discussion is sufficient compliance with § 14(a)(2)(A); but failure to give union notice and opportunity to bargain concerning the change violated § 16(a)(1) and (5)), the assertions of both Respondent and the General Counsel are wide of the mark.

Where, as here, the conduct on which the unfair labor practice is based, here, the change of a performance standard, occurred more than six months prior to the filing of the charge, the charge is untimely under the provisions of § 18(a)(4)(A) unless, ". . . it is established that the respondent agency . . . prevented the person filing the charge from discovering the allegedly unlawful conduct within the 6-month limitations period by concealment or by failing to perform a duty owed to the charging party. . . ." (United Stated Department of Labor, supra, 20 FLRA at 297) and further that, ". . . the concealment or failure to perform a duty must have prevented the discovery of the

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(footnote 6 continued)

changes by Respondent, while Article 6, Section 6, governs changes that are not applicable throughout VAMC, such as changes by individual supervisors or services. In any event, President Whitaker stated that he had never given management overall notice in writing that when performance standards were going to be changed the President was the designated representative to be notified. Mr. Whitaker stated that five or six of the more that 25 services had notified him of some type of change in performance standards, which would certainly imply that the other 19 or 20 services had not given him notice. Mr. Osman testified that there was no designated union official to be given notice of any change in performance standards by a supervisor and further testified that he had advised supervisors to give notice to the shop steward if there were a steward in that service, or, if there were no shop steward in that service, to send it to the Union office.

unfair labor practice within 6 months of its occurrence. [Emphasis added]" (United States Department of Labor, supra, 20 FLRA at 298). Here, of course, there was no concealment of the change of performance standards. The breach of duty, if there were a failure to perform a duty owed to the changing party, was the failure to give notice to the Union, which is the Charging Party, in April, 1984, of the change of the performance standards for the VRT/ITP Clerk Typist; but a breach of duty, alone, is not enough. The failure to perform a duty must have prevented the discovery of the unfair labor practice within 6 months of its occurrence. This is the governing test in this case, not whether notice of a change given to an employee who is also the shop steward constitutes notice to the Union, a question I specifically do not decide.

Did the failure of Respondent to give the Union notice of the change in the performance standards for the VRT/ITP Clerk Typist in April, 1984, prevent the discovery of this unfair labor practice within 6 months of its occurrence? I conclude that it did not. Notwithstanding that President Whitaker testified that he did not learn of the change until April, 1985 (the charge having been filed on July 29, 1985), the record fails to establish that the failure to give the Union notice of the change of Ms. Cozart's performance standard, she being the VRT/ITP Clerk Typist, in April, 1984, prevented discovery of the unfair labor practice within 6 months of its occurrence. First, Ms. Cozart, the VRT/ITP Clerk Typist was, as I have found, fully informed of the change of her performance standard in April, 1984. Not only was the change discussed with her, but she was given both the prior standard and the new evaluation standards in order that she could type the new performance standard. After she typed the new performance standard she was given a copy to retain. Indeed, General Counsel concedes that, ". . . If Cozart had been told of the change in April or October of 1984 . . . [as I have found she was] it is only reasonable to believe she would have complained to the Union about the change at that time. . . ." (General Counsel's Brief, n. 11, p. 10). Certainly, as Ms. Cozart was told of the change in her performance standard in April, 1984, she could then have informed the Union. Second, in April, 1984, the performance standards for the other nine employees in the VRT/ITP section were changed in a like manner; Ms. Cozart typed all of the new performance standards for all employees in the VRT/ITP section; the new performance standards were discussed by Mr. Hammonds with each of the VRT/ITP bargaining unit employees in April, 1984, and with each of the non-bargaining unit employees in VRT/ITP in May, 1984. As the new performance standards were fully implemented in April and May, 1984, for the entire VRT/ITP section, following discussion of the new standards with all employees of the VRT/ITP section, Respondent's conduct did not preclude the Union, the Charging Party, from filing the charge within six months after April or May of 1984 when the new performance standards were announced. United States Department of the Treasury, Internal Revenue Service and United States Department of the Treasury, Internal Revenue Service, Houston District, 20 FLRA No. 7, 20 FLRA 51 (1985). Third, on October 31, 1984, at a mid-term evaluation conference, Ms. Cozart was again given a copy of the new performance standards to review and having again been confronted with the new performance standards she could then have informed the Union. Fourth, Ms. Cozart was at all times, i.e. both in April and October, 1984, the shop steward. Notwithstanding that she was not informed of the new performance standards as shop steward, she, as shop steward, was certainly aware of the new performance standards in April, 1984. Her knowledge was far more than casual. To the contrary, she had a very direct involvement in the change of performance standards inasmuch as she typed the new performance standards, not only for herself (the VRT/ITP Clerk Typist) but for all employees of the VRT/ITP section. Fifth, as the charge and complaint related solely to the change of Ms. Cozart's performance standard in April, 1984, Ms. Cozart's knowledge in April, 1984, of the change in her performance standard, as a steward and representative of the Union, must be imputed to the Union for the purpose of § 18(a)(4)(A).

Accordingly, as the charge was untimely filed, the Complaint must be dismissed pursuant to § 18(a)(4) of the Statute, and in view of my conclusion that the charge was untimely, it is unnecessary to reach other issues raised. It is, therefore, recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. 2-CA-50428 be, and the same is hereby, dismissed.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: March 31, 1986
Washington, D.C.

24 FLRA No. 32

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNAL REVENUE SERVICE
LOUISVILLE DISTRICT

Activity

and Case No. O-AR-1232

NATIONAL TREASURY EMPLOYEES UNION

Union

ORDER DISMISSING EXCEPTIONS

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator W. Scott Thomson filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. ARBITRATOR'S AWARD

In his award the Arbitrator found that the grievant was properly disciplined for insubordination but that the penalty imposed, a suspension for 30 calendar days, was excessive. As his award, he reduced the 30-day suspension to 14 calendar days.

III. ANALYSIS AND CONCLUSIONS

The Authority has determined that it is without jurisdiction to review the Union's exceptions. Section 7122(a) of the Statute provides in pertinent part:

> Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title).

As relevant to this case, the matters described in section 7121(f) of the Statute include adverse actions under 5 U.S.C. § 7512, such as a suspension for more than 14 days. Review of an arbitration award relating to such matters must be obtained in accordance with 5 U.S.C. § 7703, that is, in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board. *American Federation of Government Employees, Local 1857 and Sacramento Air Logistics Center, McClellan Air Force Base*, 21 FLRA No. 41 (1986).

Because the Arbitrator's award relates to a matter covered by section 7512 (a suspension of the grievant for 30 days), under section 7122(a) of the Statute exceptions to the award may not be filed with the Authority. Consequently, the Authority is without jurisdiction to review the exceptions.

IV. DECISION

Accordingly, for these reasons, the Union's exceptions are dismissed.

Issued, Washington, D.C. November 26, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

24 FLRA No. 33

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AIR FORCE LOGISTICS COMMAND
McCLELLAN AIR FORCE BASE, CALIFORNIA

Respondent

and Case No. 9-CA-40168

DORA M. SOLORIO, AN INDIVIDUAL

Charging Party

DECISION AND ORDER

I. Introduction

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions to the Judge's Decision, and the General Counsel filed an opposition thereto.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions, and recommended Order as modified.

II. Analysis

The Judge found, and we agree, that Respondent violated section 7131(c) of the Statute and section 2429.13 of the Authority's regulations by refusing to grant the Charging Party, Dora M. Solorio, official time and travel and per diem expenses for her appearance at an unfair labor practice hearing in another case pursuant to a subpoena issued by a designated agent of the Authority. Respondent's refusal violated section 7116(a)(1) and (8) of the Statute.

In so concluding, we note that Respondent argues in essence that its conduct did not violate section 7131(c) of the Statute as interpreted by section 2429.13 of our regulations. In sum, Respondent contends that section 2429.13 is not in accordance with law. Insofar as Respondent's arguments are similar to those raised in Department of the Air Force, Headquarters Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 24 FLRA No. 26 (1986), we reject them for the same reasons stated in our decision in that case, which focused primarily on the travel and per diem aspect of section 2429.13.

Respondent in this proceeding also challenges the Judge's conclusion, based on our regulation, that Respondent is obligated to grant official time to the individual Charging Party. Respondent contends that it has no obligation to grant official time because: (1) the individual was not "participating for, or on behalf of, a labor organization" (see section 7131(c) of the Statute); and (2) the individual, an employee of the Respondent, testified at an unfair labor practice hearing in a matter in which Respondent was not a Charged Party and had no interest.

As to Respondent's first argument, we noted in Wright-Patterson Air Force Base the development and purposes of section 2429.13 of our regulations. That regulation continued a long-standing practice that employees participating in third-party administrative proceedings in the federal sector labor-management relations program receive official time for such participation. Section 7131(c) of the Statute was not intended to change that practice, as reflected by the statement in the House Committee Report that, pursuant to that section, the Authority is empowered "to make determinations as to whether employees participating in proceedings before the Authority shall be authorized official time." H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58 (1978).

Section 2429.13, providing for the granting of official time for employees participating in Authority proceedings, is consistent not only with this statement of Congressional intent but also with the purposes of the Statute. To limit official time for employees participating in Authority proceedings based on whose behalf the employee is testifying would hamper the Authority's ability to fulfill its responsibilities under the Statute, instead of contributing to that process as intended by section 7131(c). Rather than assisting in the resolution of unfair labor practice and representation matters, a determination by an Authority agent to require the participation of an employee might, under Respondent's theory, raise collateral issues over the employee's participation--that is, on whose behalf was the employee participating so as to be entitled to official time. We believe that Congress intended to empower the Authority to determine whether employees participating in proceedings before the Authority shall be authorized official time, and that intent is effectuated in section 2429.13 of our regulations.

As to Respondent's second argument, we agree with the Judge that the cases cited by Respondent are inapposite. As the Judge noted, those cases apply section 7131(a) of the Statute, not section 7131(c), and the reasons for the limitations present in those cases do not apply to a witness called by the General Counsel to participate in proceedings before the Authority.

Finally, with respect to the Judge's recommended Order, we have modified the Order for consistency with remedial orders previously issued in substantially similar circumstances. See, for example, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 10 FLRA 10 (1982). Our modification requires that the employee be made whole for the leave without pay for which she was charged, and requires that the employee submit a properly documented voucher in order to be reimbursed for her travel and per diem expenses. In this latter regard, we agree with the Judge that because the employee had been informed in advance by her supervisor that she would not be paid for these expenses, it would have been futile for her to file a voucher, and her failure to do so does not preclude the finding of a violation.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Air Force Logistics Command, McClellan Air Force Base, California, shall:

1. Cease and desist from:

(a) Denying official time to its employees for attendance at and participation in unfair labor practice proceedings before the Federal Labor Relations Authority when and to the extent that such participation has been deemed necessary by a designated agent of the Authority.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Grant Dora M. Solorio official time and, upon submission of a properly documented voucher, reimburse her for her travel and per diem expenses as appropriate, for January 16, 1984, when she appeared pursuant to subpoena at a hearing of the Federal Labor Relations Authority, and make her whole for the time she was charged with leave without pay for that purpose.

(b) Post at its facilities at the Air Force Logistics Command, McClellan Air Force Base, California, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by a senior official, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IX, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., November 26, 1986.

L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT deny official time to our employees for attendance at and participation in unfair labor practice proceedings before the Federal Labor Relations Authority when and to the extent that such participation has been deemed necessary by a designated agent of the Authority.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Managment Relations Statute.

WE WILL grant Dora M. Solorio official time and, upon submission of a properly documented voucher, reimburse her for her travel and per diem expenses as appropriate, for January 16, 1984, when she appeared pursuant to subpoena at a hearing of the Federal Labor Relations Authority, and make her whole for the time she was charged with leave without pay for that purpose.

____
(Activity)

Dated: ____________ By: ________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, Region IX, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103-9991, and whose telephone number is: (415) 995-5000.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

AIR FORCE LOGISTICS COMMAND :
McCLELLAN AIR FORCE BASE, CALIFORNIA :

Respondent :

and : Case No. 9-CA-40168

DORA M. SOLORIO :

Charging Party :

. . . .

Major Charles L. Brower, Esq.
For the Respondent

Stefanie Arthur
For the General Counsel, FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding arising under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101 et seq., 92 Stat. 1191 (hereinafter referred to as the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410 et seq.

On February 24, 1984, Dora M. Solorio, an individual, filed an unfair labor practice charge against the Air Force Logistics Command, McClellan Air Force Base, California (hereinafter called Respondent and AFLC, McClellan AFB). This charge was amended on May 22, 1984 and was amended a second time on July 3, 1984. On July 11, 1984, the General Counsel of the FLRA, by the Director of Region IX, issued a Complaint and Notice of Hearing alleging that AFLC violated Section 7116(a)(1) and (8) of the Statute by failing and refusing to grant Solorio official time, travel and per diem expenses for her appearance at an unfair labor practice hearing in response to subpena issued by the FLRA Director of Region IX. Respondent filed a timely Answer denying that it had violated the Statute.

A hearing was conducted before the undersigned in San Francisco, California. Respondent and General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The parties entered into an extensive stipulation of facts. Post-hearing briefs have been filed and have been fully considered.

Based upon the entire record in this matter, including the stipulation of facts, I make the following:

Findings of Fact

A. The Air Force Organization

The Department of the Air Force is a primary national subdivision of the Department of Defense (DOD). It is divided into "major commands" which are organized on a functional basis in the United States and on an area basis overseas. The Air Force Logistics Command (AFLC) is one of these major commands.

AFLC is divided into five Air Logistics Centers (ALCs), one of which is known as Sacramento ALC at McClellan AFB, California. AFLC, McClellan AFB, California, the Respondent in the instant case, is an agency within the meaning of Section 7103(a)(3) of the Statute.

At all times material to the instant case Dora Solorio was an Air Force employee at McClellan AFB, as well as Chief Steward and Second Vice President of American Federation of Government Employees Local 1857, (hereinafter called AFGE Local 1857), which represents an appropriate unit of Air Force employees at McClellan.[1]

B. The Defense Logistics Agency Organization

The Defense Logistics Agency (hereinafter called DLA) is a primary national subdivision of the DOD. DLA consists of 25 primary-level field activities, one of which is the Defense Property Disposal Service (DPDS).

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[1] AFLC and AFGE have negotiated a collective bargaining agreement covering employees in the consolidated unit. Consistent therewith, AFGE Local 1857 and Respondent have negotiated a local supplement thereto. Such agreements does not include, provisions concerning official time, travel or *per diem* for the performance of representational duties.

DPDS is divided into three Defense Property Disposal Regions (DPDRs) - The Ogden (Utah) Region, the Memphis (Tennessee) Region, and the Columbus (Ohio) Region - each of which is made up of several Defense Property Disposal Offices (DPDOs). The Ogden DPDR consists of 27 DPDOs, one of which is located on McClellan AFB, California. It is referred to as DPDO-McClellan.

AFLC McClellan AFB and DPDO-McClellan are separate organizations within DOD. Although they are both subordinate elements of DOD, they are not interrelated in any organizational manner. They have separate personnel manning, budgets, missions, organizations, regulations, and chains of command.

C. The History of Case No. 9-CA-30471

On July 8, 1983 Ezell Anderson, Jr., a DLA employee at the DPDO on McClellan, filed an unfair labor practice charge in Case No. 9-CA-30471, against DPDO-McClellan and DPDR-Ogden. The Regional Director of Region IX of the FLRA consequently issued a complaint naming the Defense Logistics Agency, DPDR-Ogden, and DPDO-McClellan as the Respondent and naming Anderson as the Charging Party.

The complaint in 9-CA-30471 alleged (1) that the Respondent therein had violated Sections 7116(a)(1) and (2) of the Statute by suspending Anderson because he had engaged in activities protected by Section 7102 of the Statute, and (2) that the Respondent therein had violated Section 7116(a)(1) of the Statute when the Chief of DPDO-McClellan threatened to fire the Charging Party because he had sought union representation.

D. The Solorio Subpoena in Case No. 9-CA-30471

On December 30, 1983, the Regional Director of Region IX, pursuant to a request by Counsel for the General Counsel made under 5 C.F.R. § 2429.7, subpenaed Solorio, an Air Force employee, to testify in the hearing of Case No. 9-CA-30471 involving DLA and the DLA employee. Solorio was subpenaed (1) to testify about the McClellan/AFGE Local 1857 collective bargaining agreement procedures prescribing the manner in which Air Force employees were to request union representation; (2) to corroborate that Anderson had used that McClellan/AFGE Local 1857 procedure in the past; and (3) that Anderson's supervisor had required requests for union representation to be in writing.

Prior to the hearing, Solorio verbally requested Respondent's labor relations officer to authorize official time and transportation and per diem expenses associated with her appearance at the hearing. Because the hearing involved a DLA bargaining unit, and not the bargaining of which Solorio was a member, the labor relations officer denied Solorio's request.

On January 16, 1984, Solorio testified at the hearing in Case No. 9-CA-30471. There was no objection to her testimony as being unnecessary. For her absence on January 16 she was charged with 8 hours leave without pay. She incurred transportation and per diem expenses of $46.57.

At no time after that hearing did Solorio file a voucher requesting reimbursement for her transportation or per diem expenses.

Discussion and Conclusions of Law

Section 7131(c) of the Statute provides:

> "(c)" Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status."

Section 2429.13 of the FLRA's Rules and Regulations, 5 C.F.R. § 2429.13, provides:

> If the participation of any employee in any phase of any proceeding before the Authority . . . including the participation in hearings . . . is deemed necessary by . . . the General Counsel . . . the Regional Director . . . such employee shall be granted official time . . . In addition, necessary transportation and per diem expenses shall be paid by the employing activity or agency.

Section 2429.13 of the FLRA's Rules and Regulations is the FLRA's implementation of Section 7131(c) of the Statute. Interpretation and Guidance, 2 FLRA 264, 270 (1979) and Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 10 FLRA 10 (1982).

Although Respondent makes cogent arguments with respect to the proper application of Section 7131(c) of the Statute, I must reject them because I am bound by the FLRA's interpretation and implementation of that section of the Statute and therefore I am constrained to apply Section 2429.13 of the FLRA's Rules and Regulations. Thus in the instant case an application of the clear terms of Section 2429.13 of the FLRA's Rules and Regulations entitles Solorio to official time and necessary transportation and per diem expenses, to be furnished by her employing activity, AFLC, McClellan AFB, for her response to the subpena issued by the FLRA Regional Director of Region IX requiring Solorio to appear at the unfair labor practice hearing in Case No. 9-CA-30471. Cf. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, supra; Department of the Treasury, Internal Revenue Service, 15 FLRA No. 108 (1984).

Respondent's reliance on Bureau of Alcohol, Tobacco and Firearms v. FLRA, 104 S. Ct. 439 (1983) is misplaced. That case deals with the FLRA's interpretation of Section 7131(a) of the Statute which deals with official time allowances to employees for collective bargaining negotiations. In holding that when § 7131(a) of the Statute requires official time, this does not include travel and per diem expenses, the Supreme Court explicitly left open whether the FLRA is in error in interpreting § 7131 (c) of the Statute as requiring travel and per diem expenses for employees appearing on official time at hearing. The Court stated specifically at footnote 9 at page 445:

> "The fact that the Authority interpreted two similar provisions of the Act consistently does not, however, demonstrate that either interpretation is correct. We, of course, express no view as to whether different considerations uniquely applicable to proceedings before the Authority might justify the FLRA's interpretation of § 7131(c)."

Thus it is clear that the Supreme Court was not modifying the FLRA's implementation of Section 7131(c) of the Statute. Similarly Respondent's reliance on the FLRA's cross unit bargaining cases[2] is misplaced. These cases deal with the FLRA's application of Section 7131(a) of the Statute and the reasons for the limitations present in those cases do not apply to a witness called by the General Counsel of the FLRA in an unfair labor practice hearing.

Finally Respondent contends Solorio is not entitled to transportation and per diem expenses because she did not file a voucher requesting that sum. However, because Solorio was informed in advance by her supervisor that she would not be paid for transportation and per diem expenses, it would have been futile and meaningless act for her to file a voucher requesting payment of these amounts. I conclude that her failure to execute such a meaningless and futile act can not prejudice Solorio from receiving these amounts due.

In light of the foregoing, I conclude that Respondent did violate the requirements of Section 7131(c) of the Statute by failing and refusing to grant Solorio official time to testify, pursuant to the subpena, at the unfair labor practice hearing in Case No. 9-CA-30471 and by failing and refusing to pay her the necessary transportation and per diem expenses. Accordingly, I conclude that Respondent violated Sections 7116(a)(1) and (8) of the Statute.

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[2] 2750th ABW Headquarters, Wright-Patterson AFB, Ohio, 7 FLRA 738 (1982); 94th U.S. Army Reserve Command, Hanscom AFB, Massachusetts, 8 FLRA 83 (1982); U.S. Naval Space Surveillance Systems, Dahlgren, VA, 9 FLRA 193 (1982); Ogden Logistics Center, Hill AFB, Utah, 10 FLRA 245; and Marine Corp. Development and Education Center, 9 FLRA 251 (1982).

Having found that Respondent violated Section 7116(a)(1) and (8) of the Statute, I recommend that the Authority issue the following:

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute the Authority hereby Orders, that the Air Force Logistics Command, McClellan Air Force Base, California, shall:

1. Cease and desist from:

(a) Refusing to grant official time or pay travel and per diem expenses incurred by our employees who appear pursuant to subpena before the Federal Labor Relations Authority to testify on behalf of the General Counsel of the Federal Labor Relations Authority.

(b) In any like or related manner interfering with, restraining or coercing our employees in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Grant Dora Solorio official time and pay her travel expenses and per diem as appropriate, for January 16, 1984 when she appeared pursuant to subpena at a hearing of the Federal Labor Relations Authority.

(b) Post at their facilities in the Air Force Logistics Command, McClellan Air Force Base, California, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by a responsible official, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IX, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: April 15, 1985
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to grant official time or pay travel and per diem expenses incurred by our employees who appear pursuant to subpena before the Federal Labor Relations Authority to testify on behalf of the General Counsel of the Federal Labor Relations Authority.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL grant Dora Solorio official time and pay her travel and per diem as appropriate, for January 16, 1984 when she appeared pursuant to subpena at a hearing of the Federal Labor Relations Authority.

AIR FORCE LOGISTICS COMMAND
McCLELLAN AIR FORCE BASE, CALIFORNIA
____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region IX, whose address is: 530 Bush Street, Suite 542, San Francisco, California 94108 and whose telephone number is: (415) 556-8106.

24 FLRA No. 34 (24 FLRA No. 34)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 2027

Union

and Case No. 0-NG-1326

ACTION

Agency

ORDER DISMISSING PETITION FOR REVIEW

This case is before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute on a petition for review of negotiability issues filed by the Union.

The record in this case indicates that by letter dated September 4, 1986, the Agency declared the Union's proposals concerning time and attendance reporting procedures to be nonnegotiable. On September 19, 1986, pursuant to section 7117 of the Statute and section 2424.1 of the Authority's Rules and Regulations, the Union filed a petition for review seeking a determination as to whether the disputed proposals were within the duty to bargain. Subsequently, in a letter dated October 20, 1986, the Agency withdrew the allegation of nonnegotiability.

Since the Agency has withdrawn the allegation concerning the Union's proposals, there is no longer an issue as to whether the proposals are within the parties' duty to bargain under the Statute.

Accordingly, and apart from other considerations, the petition for review in this case is hereby dismissed.

For the Authority.

Issued, Washington, D.C., November 28, 1986

Harold D. Kessler

Harold D. Kessler
Director of Case Management

24 FLRA No. 35

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNAL REVENUE SERVICE
CINCINNATI DISTRICT OFFICE

Activity

and Case No. 0-AR-1146

THE NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 9

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Patrick A. McDonald filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance in this matter arose when a number of seasonal employees were furloughed because of a reduction in the number of hours allocated to the Taxpayer Service Division. According to the Arbitrator, 32 of the employees were notified by the Activity on February 11, 1985 that they would be furloughed at the close of business on February 12; one employee was notified on February 12 that she would be furloughed at close of business that day. Sixteen others were notified on February 25 that they would be furloughed at the close of business on February 26 and one employee was notified on February 26 that she would be furloughed that same day. A group grievance was filed, contending that the Activity's failure to provide five days advance notice of the furloughs violated Article 25, Section 1H of the collective bargaining agreement, which provides: "An employee will, whenever possible, receive five days notice of furlough." The matter was submitted to arbitration.

The parties stipulated to the Arbitrator that the furloughed employees were "ready, willing and able to work for four days following their furlough." The Arbitrator found that the Activity knew before the furloughs were announced that the number of hours available was reduced and that furloughs would be necessary. He ruled that the Activity could have given five days notification and that by not doing so it violated Article 25, Section 1H. He rejected the Activity's contention that the grievance infringed on its rights to determine its mission, budget, and number of employees. As his award he sustained the grievance and ruled that the Activity's violation of the notice requirement of the agreement "resulted in the denial of all or part of the pay and allowances otherwise due to the grievants for four days following February 12, 1985 and February 26, 1985." He ordered the Activity to reimburse the grievants at their straight-time rate for the four days following their notifications of furlough.

III. FIRST EXCEPTION

A. Contentions

The Agency contends the award is contrary to the Back Pay Act, 5 U.S.C. § 5596, because the Arbitrator failed to make the requisite findings to support the award of backpay. Specifically the Agency contends that the Activity's failure to give five days notice to the grievants did not constitute an unwarranted or unjustified personnel action because the agreement provision violated was discretionary, not mandatory. Further, the Agency contends that the Arbitrator did not make the required finding that the violation directly resulted in the reduction or loss of pay to the grievants and that he failed to address evidence showing that the grievants would not have worked beyond the furlough dates.

B. Analysis and Conclusion

We find that this exception fails to establish that the award is deficient as alleged. In order for an award of backpay to be authorized under the Back Pay Act, the arbitrator must find that an agency personnel action was unjustified or unwarranted, that the personnel action directly resulted in the withdrawal or reduction of the grievant's pay, allowances or differentials, and that but for the action, the grievant would not have suffered a withdrawal or reduction of pay, allowances or differentials. American Federation of Government Employees, Local 1760 and Social Security Administration, Northeastern Program Service Center, 22 FLRA No. 19 (1986).

In this case, the Arbitrator found that the Activity violated the agreement provision and that it was possible for the Activity to give five days notice under the circumstances presented. Contrary to the Agency's contention, the Arbitrator's interpretation of the agreement as imposing a mandatory requirement for five days notice when possible constitutes a finding by an appropriate authority under the Back Pay Act. See National Labor Relations Board Union, Local 19 and Office of the General Counsel, National Labor Relations Board, 7 FLRA 21 (1981). Therefore, the Activity's action furloughing the grievants without the required notice was an unjustified or unwarranted personnel action under the Back Pay Act.

As to the second part of the Agency's exception, we find that the Arbitrator made the required finding under the Back Pay Act that the Activity's failure to give the grievants five days notice directly resulted in their not working for the four days following furlough. He specifically found that the Activity knew sufficiently in advance that furloughs would be required, he noted the parties' stipulation that the grievants were available to work, and he found that the Activity had sufficient hours in its allocation to employ them during the notice period. The Agency fails to show that the Arbitrator erred in finding that the grievants otherwise would have worked for four days following notice or that he ignored evidence pertaining to that. Its exception constitutes nothing more than disagreement with the Arbitrator's finding of fact and with his reasoning and conclusions. This disagreement provides no basis for finding an award deficient. Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local No. R7-23, 4 FLRA 712 (1980).

IV. SECOND EXCEPTION

A. Contentions

The Agency contends that the award is contrary to section 7106(a)(2)(A) of the Statute because it restricts its right to layoff employees and imposes a mandatory notice requirement. The Agency maintains that the effect of the award is to nullify the furloughs which were implemented.

B. Analysis and Conclusion

The Agency's second exception fails to show that the award violates section 7106(a)(2)(A) of the Statute. Contrary to the Agency's contentions, the award in no way prevents the Activity from furloughing or laying off employees. Rather, the award only enforces the Activity's contractual obligation to give employees notice of furlough "whenever possible." The Authority has consistently held that the rights reserved to management under section 7106(a) of the Statute are subject to procedures negotiated under section 7106(b)(2) and such procedures are enforceable by grievance and arbitration. *National Treasury Employees Union and U.S. Customs Service*, 18 FLRA No. 94 (1985). The Authority has found that a bargaining proposal which provided for a 30 day notice of reduction in force was a negotiable procedure which would not prevent the agency from laying off and/or retaining employees. *National Federation of Federal Employees, Local 108 and U.S. Department of Agriculture, Farmers Home Administration*, 16 FLRA 807 (1984) (Proposal 2). In this case, the agreement provision for a five day notice of furlough whenever possible also constitutes a procedure which was properly enforceable by the Arbitrator. Consequently, the award is not contrary to section 7106(a)(2) of the Statute.

V. DECISION

Accordingly, for the above reasons, the Agency's exceptions are denied.

Issued, Washington, D.C., December 4, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

24 FLRA No. 36

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ARMY AND AIR FORCE EXCHANGE
SERVICE, DALLAS, TEXAS

Respondent

and

Case No. 7-CA-50646

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1345,

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had committed certain unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist therefrom and to take certain affirmative action. The Judge found that the Respondent had not engaged in other unfair labor practices alleged in the complaint and recommended that the portion of the complaint relating to those unfair labor practices be dismissed. Thereafter, the Respondent filed exceptions only to the Judge's recommendation that it be ordered to provide without charge to the Union a copy of a video tape in connection with an employee grievance.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudical error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority adopts the Judge's findings, conclusions and recommended Order.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Army and Air Force Exchange Service, Dallas, Texas, shall:

1. Cease and desist from:

(a) Failing and refusing to provide, without charge to the American Federation of Government Employees, AFL-CIO, Local 1345 (hereinafter referred to as "Local 1345"), the employees' exclusive representative, a copy of the data requested by Local 1345 relating to disciplinary action against employee Nancy Bundy.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Provide, without charge, to Local 1345 a copy of the video tape for July 3,1985, the day on which the alleged under ring by Nancy Bundy occurred.

(b) Make available for inspection by Local 1345 the entire cash register tape for the cash register used by Nancy Bundy on the day of the alleged under ring by Nancy Bundy and provide, without charge, to Local 1345 a copy of such portions of said cash register tape as Local 1345 may designate.

(c) Post at its facilities at the Army and Air Force Exchange Service, Fort Carson, Colorado, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by a senior official of the Army and Air Force Exchange Service, Fort Carson, Colorado, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The appropriate official shall take reasonable steps to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to § 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region VII, Federal Labor Relations Authority, 535 16th Street, Suite 310, Denver, Colorado 80202, in writing, within 30 days of this Order, as to what steps have been taken to comply herewith.

(24 FLRA No. 36)

IT IS FURTHER ORDERED that that portion of the Complaint which relates to Local 1345's request for data of August 23, 1985, be, and the same is hereby, dismissed.

Issued, Washington, D.C., December 4, 1986.

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to provide, without charge to the American Federation of Government Employees, AFL-CIO, Local 1345 (hereinafter "Local 1345"), our employees' exclusive representative, a copy of the requested data relating to disciplinary action against employee Nancy Bundy.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL provide, without charge, to Local 1345 a copy of the video tape for July 3, 1985, the day on which the alleged under ring by Nancy Bundy occurred.

WE WILL make available for inspection by Local 1345 the entire cash register tape for the cash register used by Nancy Bundy on the day of the alleged under ring by Nancy Bundy, and we will provide, without charge, to Local 1345 a copy of such portions of said cash register tape as Local 1345 may designate.

____
(Agency or Activity)

Dated: ________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 7, whose address is: 535 16th Street, Suite 310, Denver, Colorado 80202 and whose telephone number is: (303) 837-5224.

(24 FLRA No. 36)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

ARMY AND AIR FORCE EXCHANGE
SERVICE, DALLAS, TEXAS

Respondent

and   Case No. 7-CA-50646

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 1345

Charging Party

. . . .

Luther G. Jones, Esquire
For the Respondent

Nicholas J. LoBurgio, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et. seq.1/, and the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., in essence concerns whether Respondent failed to comply with § 14(b)(4) of the Statute and thereby violated §§ 16(a)(1) and (8) of the Statute by failing to provide the Union with a copy of a

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1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, e.g. Section 7114(b)(4) will be referred to, simply, as "§ 14(b)(4)."

video-tape, although the Union had been shown the tape, i.e., the tape had been run on a VCR and viewed on a TV screen.

This case was initiated by a charge filed on September 30, 1985 (G.C. Exh. 1(a)) which alleged violations of §§ 16(a)(1) and (8); a Complaint and Notice of Hearing issued on January 7, 1986 (G.C. Exh. 1(c)), which alleged violations of §§ 16(a)(1), (5) and (8); a First Amended Charge was filed on January 17, 1986 (G.C. Exh. 1(b)) which alleged violations of §§ 16(a)(1), (5) and (8); and an Amended Complaint and Amended Notice of Hearing issued on January 22, 1986, which alleged violations of §§ 16(a)(1), (5) and (8) and set the hearing for February 18, 1986, pursuant to which a hearing was duly held on February 18, 1986, in Colorado Springs, Colorado, before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument. At the close of the hearing, March 18, 1986, was fixed as the date for mailing post-hearing briefs, and General Counsel and Respondent each filed a brief, received on, or before, March 18, 1986, which have been carefully considered. Upon the basis of the entire record,[2] including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. American Federation of Government Employees, AFL-CIO, Local 1345 (hereinafter referred to as the "Union"), represents employees in two separate bargaining units at Fort Carson, Colorado. One unit encompasses appropriated fund activities; and the other covers non-appropriated fund Army and Air Force Exchange Service employees at the Fort Carson Exchange and the Pueblo Army Depot (hereinafter referred to as "AAFES") (G.C. Exh. 2, Tr. 16-17). The AAFES exchange at Fort Carson is essentially similar to a department store.

2. Sometime in late June, 1985, about June 27 or 28, Respondent, through electronic surveillance specialists from its Ohio valley Exchange Region, at the request of AAFES

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[2] General Counsel filed a Motion to Correct Transcript of the Proceedings; Respondent made no objection; and having found the requested corrections entirely proper, General Counsel's motion is hereby granted and the transcript is hereby corrected as more fully set forth in the Appendix hereto.

locally, began covert video-tape surveillance of unit employee/ cashier Nancy Bundy (Tr. 91-93). These specialists made 14 eight hour tapes of Ms. Bundy at work (Tr. 95). Upon completion of the surveillance, the surveillance specialists departed the area and left with Respondent's Area Security Specialist, Janet Scruggs, one, July 3, 1985, video-tape which contained an alleged infraction of procedures by Ms. Bundy.

3. Upon receipt of this video-tape, Ms. Scruggs took a VCR out of stock (i.e., a VCR for sale through AAFES) and showed the video-tape to management officials of AAFES (Tr. 96, 101-102). On July 12, 1985, Ms. Bundy was issued a letter placing her on administrative leave (Tr. 60, 61; G.C. Exh. 3). Ms. Bundy reported to the Union that Mr. Harry Reimann, at the time Fort Carson Exchange detective supervisor, when he delivered the letter of July 12, told her that, ". . . they had her on tape, that there was some alleged mishandling of merchandise, improper scanning or something, and that she was going to be investigated with possible termination." (Tr. 17). Ms. Carolyn Gudjonsson, a Senior Health Technician at the Medical Activity, U.S. Army Community Hospital, Fort Carson, and President of the Union, called Mr. Richard Miller, Personnel Manager for the Rocky Mountain Area Exchange, which includes Fort Carson, as well as Peterson Air Force Base, the U.S. Air Force Academy, Lowry Air Force Base, Fitzsimons Army Medical Center, and F. E. Warren Air Force Base in Cheyenne, Wyoming, and told him the Union was concerned about Ms. Bundy being placed on administrative leave and asked Mr. Miller what sort of tape were they talking about (Tr. 18). Mr. Miller told Ms. Gudjonsson that ". . . they had a video film or video tape, and also had a cash register tape that showed that she [Bundy] had mishandled merchandise." (Tr. 18).

4. By letter dated July 24, 1985, and addressed to Mr. Miller (G.C. Exh. 4), Ms. Gudjonsson, as President of the Union, pursuant to § 14(b)(4) of the Statute requested copies of:

> -1. Vidio (sic) -tape showing alleged under-ring by Nancy Bundy
>
> -2. Sales tape from the register used by Nancy Bundy on the day of alleged under-ring."

(G.C. Exh. 4).

5. Mr. Miller testified that on the 25th or 26th of July, 1985, although he had not received the request of July 24, he received another telephone call from Ms. Gudjonsson in which she stated that, ". . . Mrs. Toro, who is the main store

manager, would not allow them to view a copy of the video tape that contained the alleged under ring by Nancy Bundy. I responded to her by saying that I would make certain that the tape was made available to them for their viewing, and that I would contact Mrs. Toro and make her aware that we were obliged to allow the union to view the tape and they should arrange a mutually convenient time. She mentioned the cash register tape and again, I stated that certainly we would make that available to them to view to look at in any way they wished, being this is potential evidence in a disciplinary action. Of course, I didn't feel it was appropriate to simply give it to them at that time, but I felt it was important that they see it certainly." (Tr. 65-66).

6. Notwithstanding Ms. Gudjonsson's formal written request of July 24, 1985, and her telephone conversation with Mr. Miller on July 25 or 26, 1985, Respondent did nothing with regard to the Union's requests until August 16, 1985, when, at the conclusion of a meeting on other matters, Mr. J.R. Cupples, Fort Carson Exchange Manager, told Ms. Clara Benson, Union Exchange representative, and Ms. Marlene Moosman, Union Executive Vice President, that the video tape on Ms. Bundy was available for them to see. Mr. Cupples arranged for the viewing in the office of Mr. Mark Polczynski, AAFES Sales and Merchandise Manager. Present in the room at the viewing of the tape were: Moosman, Benson, Reimann, who ran the tape, Polczynski and Ms. Eleanor Richards, AAFES Detective (Tr. 43-44).[3] Shortly after Mr. Reimann started the tape, Ms. Benson said, "Wait a minute. Where is Nancy [Bundy]? I thought she was suppose[d] to be in this meeting" (Tr. 45); and Ms. Benson said that Mr. Reimann responded, "Nancy has already seen the film" (Tr. 45). Ms. Benson told Mr. Polczynski, ". . . we need her to review the film with us . . ." and Mr. Polczynski went out and paged Ms. Bundy to come to the office (Tr. 45). When Ms. Bundy arrived, Ms. Benson stated that she, Bundy had never seen the film (Tr. 45). At any event, with Ms. Bundy present the video tape was run and then re-run at a slower speed and the tape was stopped on different actions, ". . . like for this second scan and the third scan." (Tr. 48). After the video tape had been shown, Mr. Reimann handed Ms. Moosman the cash register receipt and stated there were ". . . three items on the register tape and four items on the film." (Tr. 49).

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[3] It would appear that the video tape was shown to the Union on a second occasion when the tape was released, at Mr. Cupples request, to Ms. Richards to "show it again." (Tr. 97, 98).

Ms. Moosman looked at the cash register tape and then handed it to Ms. Benson and as Ms. Benson looked at the cash register tape, she said she stated, "Well, if there is four items listed, isn't it possible that the scanner did not pick up this item." at which point Mr. Polczynski said, "Well, that has happened to me several times" (Tr. 49) and Mr. Reimann said, "You [Polczynski] shouldn't have said that." (Tr. 49). Ms. Benson said she, ". . . saw four items go through over the scanner." (Tr. 46).

7. After review of the video tape, Ms. Moosman said she did not see the red light and Ms. Benson confirmed that she could not see a red light either (Tr. 49, 48). The existence or non-existence of the red light is important to the Union's defense of Ms. Bundy because it could show whether or not she should have been aware that an item placed on the scanner had not actually been picked up by the scanner (Tr. 48, 54).

8. Mr. Reimann stated to Ms. Moosman, Ms. Benson and Ms. Bundy that, ". . . they had filmed Mrs. Bundy for over a week and that they had three to five more tapes"; but when Ms. Benson asked to see them because, according to Benson, "We are supposed to view all the video film that you have on Nancy [Bundy]", Mr. Reimann said they did not have them; that they had been sent to the Ohio Valley Exchange Region in Charleston, Indiana, which was confirmed by Mr. Polczynski (Tr. 50). Ms. Benson testified that she understood that if a red light came on the light must cleared, by running the item over the scanner until it picks up the code or the price of the item is entered manually, before the register will give a total price of the purchases (Tr. 56).

9. After Ms. Benson and Ms. Moosman reported to Ms. Gudjonsson about the problems they had in reviewing the excerpt of the video tape which Respondent had shown, Ms. Gudjonsson, by letter dated August 19, 1985 (G.C. Exh. 9), again requested copies of:

> "-1. Copy of the vidio (sic) tape showing alleged under ring by Nancy Bundy.
>
> -2. Copy of the sales register tape used on day of alleged under ring.
>
> -3. Documentation reflecting any and all other data relied upon to substantiate the reasons for the proposed removal."

(G.C. Exh. 9).

10. By letter dated August 23, 1985 (G.C. Exh. 10), Ms. Gudjonsson expanded her request and asked for,

> "1. All vidio (sic) films or all employees for the last two months, to include the months of July and August, 1985." (G.C. Exh. 10).

11. In the meantime, on August 2, 1985, Ms. Bundy had been given an "Advance Notice of Separation for Cause" (G.C. Exh. 5), which was rescinded by letter dated August 6, 1985, "Due to a procedural error . . . ." (G.C. Exh. 6); however, a further "Advance Notice of Separation for Cause" was given to Ms. Bundy on August 7, 1985 (G.C. Exh. 7). Ms. Bundy responded by letter dated August 9, 1985 (G.C. Exh. 8), and, inter alia designated as her representative," AFGE Local 1345 and Mary McRae, Union Steward or her designee." (G.C. Exh. 8). By letter dated August 28, 1985, Ms. Bundy was given "Final Notice of Separation for Cause" (G.C. Exh. 11).

12. On September 13, 1985, Ms. Bundy filed a 1st Step Grievance (G.C. Exh. 12).

13. On the same date that Ms. Bundy filed her grievance, September 13, 1985, Mr. Miller, for the first time responded to Ms. Gudjonsson's information requests. His letter, dated September 13, 1985 (G.C. Exh. 13) stated as follows:

> "1. Reference your letters . . . dated 19 and 23 August 1985. [Mr. Miller denied ever having received Ms. Gudjonsson's letter of July 24, 1985]
>
> "2. A copy of the video tape showing the 'alleged under ring by Nancy Bundy' is not available. Ms. Bundy and her representative reviewed this video tape on 16 August 1985, and the original tape is available for your further review at a mutually acceptable time. Should you feel that a copy is required, we would create a copy of the tape provided the Union would be willing to reimburse Management for any expense incurred. Please advise us if you should wish to again view the tape, or if a copy is required. (Emphasis supplied).
>
> "3. The cash register tape used on the day of the alleged under ring was also reviewed

> by Ms. Bundy and her representative on 16 August 1985. As we discussed in an earlier telephone conversation, Management will provide a copy of the appropriate segment of that cash register tape. Should you wish to review the entire tape again, it can be made available at a mutually acceptable time.
>
> "4. There is no other documentation or data which was relied upon by Management in making a decision to propose Ms. Bundy's separation for cause.
>
> "5. Your request for 'All video films on all employees for the last two months to include the months of July and August, 1985,' has been carefully considered, and Management is unconvinced that those tapes would constitute relevant data in this matter. We will consider any further input you might have on this matter." (G.C. Exh. 13).

14. Ms. Bundy's grievance was denied at the first step; on September 23 1985, was elevated to the second step (G.C. Exh. 14), where it was denied on September 26, 1985 (G.C. Exh. 16). On the same day, that the second step grievance was denied, September 26, 1985, Mr. Miller provided Ms. Gudjonsson with a copy of a section of the cash register tape which shows the transaction in question (G.C. Exh. 15). On October 1, 1985, Ms. Bundy elevated her grievance to the third step (G.C. Exh. 17); and on October 21, 1985, Mr. Cupples reduced the separation to a 14 calendar day suspension, which he considered to have been served, and reinstated Ms. Bundy to a non-cash-handling position, effective August 31, 1985 (G.C. Exh. 18). By letter October 22, 1985, the "settlement offered" by Mr. Cupples at the third step was rejected (G.C. Exh. 19); by letter dated October 24, 1985, Mr. Cupples advised Ms. Gudjonsson that his letter of October 21, was "not an offer of settlement, but rather my final decision on her grievance" (G.C. Exh. 20). Mr. Cupples further advised that by returning to work Ms. Bundy "does not waive any rights she may have to grieve the personnel action taken in my final decision." (G.C. Exh. 20). By letter dated October 28, 1985, Ms. Gudjonsson advised Mr. Cupples that Ms. Bundy would return to work on October 31, 1985, in a non-cash-handling position, with the understanding that this, ". . . in no way waivers any of her rights in the grievance/arbitration process . . . ." (G.C.

Exh. 21). On October 25, 1985, a request for arbitration panel was filed (G.C. Exh. 22). At the time of the hearing, an arbitrator had not been selected and Ms. Gudjonsson testified that the Union still needs the requested data for the pending arbitration (Tr. 39, 40, 41).

15. In order to produce a copy of a video tape, two VCRs are required (Tr. 99, 100), with, of course, the necessary connections. The tape in question was recorded at the slowest possible speed and, to play the tape back, the VCRs must be capable of speed adjustment to this slow speed, a feature not all VCRs have. VCRs, if capable of the necessary speed adjustment, could be taken out of stock and used for this purpose; or the surveillance specialists, who have the necessary equipment, could make a copy. The estimated cost of each blank video tape was $4.00 to 6.00 (Tr. 101) and, once started, the process is automatic (Tr. 101).

16. Ms. Gudjonsson testified that the Union needed copies of both the video tape and the cash register tape for a variety of reasons: a) because most of the Union's grievance work by representatives is done after normal business hours; b) the need to show the video tape to co-workers of Ms. Bundy, either after hours or at their homes, to determine what the normal procedures for cashiers were and whether Ms. Bundy was being treated disparately (Tr. 25, 26, 28, 32); c) the Union needed to review the video tape privately so that they could openly discuss the pros and cons of the case; d) the Executive Board is required to review all available evidence before making a decision to take the case to arbitration (Tr. 30); e) the Executive Board members are primarily appropriated fund employee and must take annual leave to work on AAFES cases; f) review of the video tape alone is not satisfactory because to correlate events before, during and after the alleged infraction, the entire cash register receipt must be reviewed (Tr. 33). Ms. Benson testified that copies of the data were needed for similar reasons (Tr. 51, 52, 53).

Conclusions

§ 14(b)(4) of the Statute provides:

> "(b) The duty of an agency . . . shall include the obligation --
>
> . . . .
>
> "(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data -

> "(A) which is normally maintained by the agency in the regular course of business;
>
> "(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> "(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining . . . ."
>
> (5 U.S.C. § 7114(b)(4)).

It is well established that a union's right to receive, and the agency's obligation to furnish, such data pursuant to § 14(b)(4) extends to the union's statutory representational obligation in the processing of an employee grievance. Bureau of Alcohol, Tobacco and Firearms, National Office and Western Region, San Francisco, California, 8 FLRA No. 108, 8 FLRA 547 (1982); Veterans Administration Regional Office, Denver Colorado, 10 FLRA No. 78, 10 FLRA 453 (1982).

At the hearing, counsel for Respondent conceded that video tapes and cash register tapes constituted "data", within the meaning of § 14(b)(4) of the Statute, for the purpose of this case (Tr. 107). In any event, I specifically find that business records, regardless of physical form, constitute data within the meaning of § 14(b)(4) of the Statute. See, for example, Long v. Internal Revenue Service, 596 F.2d 362 (9th Cir. 1979); 44 U.S.C. § 3301.

1. Request for video tape showing alleged under ring.

Respondent advances two defenses: First, that in its requests[4] the Union did not set forth reasons why copies the data requested were necessary. Thus, Respondent states,

---

[4] Inasmuch as the Union renewed its request on August 19, 1985, I find it unnecessary to decide whether Respondent did, or did not, receive the request of July 24, 1985.

> "There has been no refusal to provide data to the Union. The obligation to provide the basis for the Union's conclusion that certain data is 'necessary,' as required by § 7114 (b)(4)(B), rests upon the Union. The Activity cannot be compelled to guess. At the time the letter of September 13, 1985 [G.C. Exhibit 13] was written, the Activity had no knowledge of the reason the Union sought a copy of the video tape. In this letter the Activity's last sentence was a request for further input, i.e., '[w]e will consider any further input you might have on this matter.' Instead of providing the Activity an explanation, the Union filed its unfair labor practice charge [G.C. Exhibit 1a] and did not disclose, until the day of trial, the basis for its conclusion that a copy was 'necessary.' The Activity has been denied an opportunity to consider such basis and, therefore, cannot be considered to have refused." (Respondent's Brief, pp. 1-2).

It is certainly true that the Union did not set forth in detail the reasons for its need for copies of the video tape and cash register tapes in its requests. The Union merely stated,

> "Such information is necessary[5] to evaluate the grounds for a grievance or other applicable action beyond PL 95-454." (G.C. Exhs. 4, 9 and 10).

Nevertheless, the short answer to Respondent's assertion is that Respondent never asked why the Union needed the copies of the data requested. As I stated, in Internal Revenue Service, Memphis Service Center and National Treasury Employees Union, Case No. 4-CA-30371, OALJ-84-66, ALJ Decisions Report No. 38 (July 5, 1984), ". . . an agency acts at its peril if it refuses to furnish data without asking for a reason. Then, of course, the union may subsequently show its justification for the request. Where an agency sought clarification of the reason for a request and the union failed to respond, refusal to furnish the data requested was not an unfair labor practice. Internal Revenue Service, Buffalo District, Buffalo, New York, 7 FLRA No. 102, 7 FLRA 654 (1982)." (Case No. 4-CA-3071 at p. 7); see, also, Department of Health and Human Services, Social Security Administration, Field Operations, New York Region, 21 FLRA No. 35, 21 FLRA 253 (1986).

---

[5] The words "in order" were added, following "necessary" and before "to" in the requests of August 19, and 23, 1985.

The Union's written requests of July 24 and August 19, 1985 had been for copies of:

> "-1. Vidio (sic) - tape showing alleged under-ring by Nancy Bundy" (July 24; G.C. Exh. 4)
>
> "-1. Copy of the vidio (sic) tape showing alleged under ring by Nancy Bundy." (August 19; G.C. Exh. 9)
>
> "-2. Sales tape from the register used by Nancy Bundy on the day of alleged under-ring." (July 24; G.C. Exh. 4)
>
> "-2. Copy of the sales register tape used on day of alleged under ring." (August 19; G.C. Exh. 9).

On August 23, 1985, the Union requested copies of: "-1 All vidio (sic) films on all employees for the last two months, to include the months of July and August, 1985." (G.C. Exh. 10). Mr. Miller, in his letter of September 13, 1985, first responded to the request of August 19, 1985 (he denied ever having received the request of July 24, 1985, although the request was addressed to him) and in the final paragraph responded to the request of August 23, 1985. As the request of August 23 was vastly different, as was the response, this request will be considered hereinafter.

The Union's request of August 19, and the wholly identical request of July 24, for a copy of the video tape ". . . showing alleged under ring by Nancy Bundy" was not denied because the Union had not shown the reason for need of the copy; nor did Respondent request further justification than, as the Union had asserted, "Such information is necessary in order to evaluate the grounds for a grievance or other applicable action beyond PL 95-454" (G.C. Exh. 9). To the contrary, Respondent, in its response of September 13, 1985, stated:

> "2. A copy of the video tape showing the 'alleged underring by Nancy Bundy' is not available . . . Should you feel that a copy is required, we would create a copy of the tape provided the Union would be willing to reimburse Management for any expenses incurred . . . Please advise us . . . if a copy is required." (G.C. Exh. 13) (Emphasis supplied).

Consequently, Respondent's assertion, that, "The Activity has been denied an opportunity to consider such basis [i.e. "that a copy was 'necessary'"] . . ." is without basis and is rejected.

The Union has demonstrated that a copy of the video tape "showing alleged under ring" was ". . . both necessary and relevant to enable the Union to fulfill its legitimate representational role in processing the employee's grievance . . . ." Veterans Administration Regional Office, Denver, Colorado, supra, 10 FLRA at 454. Moreover, Mr. Miller, Respondent's Personnel manager, testified that, since the video tape and the cash register tape was the only evidence against Ms. Bundy (Tr. 77), it was "important" that the Union see it (Tr. 66); "that the Union had a right to see all of the video tape and all of the cash register receipts . . . ." (Tr. 79-80); and counsel for Respondent at the hearing stated, ". . . I believe there is a basis to the union's position that they would have the right to review the video tape covering transactions that occurred previous to and after in order to satisfy themselves that there was nothing unusual or particularly misrepresentative of the particular transaction involved." (Tr. 112-113).

Once it is established that data, which in this case obviously was "reasonably available," is necessary to enable the Union to process the employee's grievance, and as shown this was readily admitted by Respondent, I do not agree with Respondent that the Union must show further necessity for a copy of the data which has already been shown to be "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining" (§ 14(b)(4)(B)), "collective bargaining", of course, encompassing the processing of grievances). When a request for data covers various different items, production of the requested items for examination by the Union may be sufficient initial compliance with the "furnish" requirement of § 14(b)(4); and a request for copies of some, or all, of the items "furnished" may be subject to a showing that they are "necessary" since there has not been a determination that any particular item is necessary for the purposes of § 14(b)(4). But when, as here, the video tape has been shown to be, and conceded to be, necessary for the purposes of § 14(b)(4), no further showing of necessity may be required. In any event, General Counsel in this case has shown the particular need of the Union for a copy of the video tape "showing alleged under ring."

In truth, Respondent's actual concern relates to whether it should have to make a copy of a video tape as it conceded at the hearing that if this had been a written document, "Under the present state of law, they would be entitled to have copies of those documents without cost." (Tr. 108). Since this is Respondent's second defense, it will be addressed hereinafter.

If Respondent had provided the Union with a copy of the segment of the video tape which showed the "alleged under ring," _i.e._ the approximately 30 second segment shown to the Union on August 16, 1985, I would have found no violation since the Union's requests easily could have been construed to have asked for no more; but, from the record it is clear that the Union asked for a copy of the entire video tape which showed the alleged under ring; that Respondent so understood the Union's request; and Counsel for Respondent conceded that the Union had ". . . the right to review the video tape covering transactions that occurred previous to and after . . ." (Tr. 112-113). Indeed, Respondent has made no distinction between providing a copy of a segment of the video tape and the entire video tape.

2. All video tapes on all employees.

The Union's request of August 23, 1985, was for:

> "-1. All vidio (sic) films on all employees for the last two months, to include the months of July and August, 1985" (G.C. Exh. 10).

As to this request, Mr. Miller responded, in relevant part,

> ". . . Management is unconvinced that those tapes would constitute relevant data in this matter . . . ." (G.C. Exh. 13).

With regard to the August 23, 1985, request, Respondent clearly questioned the relevancy of additional tapes and, effectively, asked for justification to which the Union failed to respond and for this reason alone, Respondent's refusal to furnish the tapes requested on August 23, 1985, was not an unfair labor practice. *Internal Revenue Service, Buffalo District, Buffalo, New York*, *supra*; *Department of Health and Human Services, Social Security Administration and Social Security Administration, Field Operations, New York Region*, *supra*. Moreover, nothing in the record shows any relevancy or materiality of such additional tapes and/or that such data is necessary for the purposes of § 14(b)(4)(B). To the contrary, although Ms. Bundy was taped for fourteen days and possibly other employees would have used the same cash register, *e.g.*, during Ms. Bundy's absence on breaks, etc., when the surveillance specialists left Fort Carson they took all tapes with them except the one tape, for July 3, 1985, on which the alleged under ring was shown. Not only was no portion of any other tape used or relied upon in any manner by management in regard to the proposed disciplinary action taken against Ms. Bundy, but no representative of management ever saw any portion of any of the other thirteen tapes. Accordingly, I find that such data was not necessary and Respondent's failure to furnish such data was not an unfair labor practice.

Respondent's second defense is stated as follows:

> "It is not consistent with effective and efficient government to require an activity to provide a file copy of a video tape to the unions for the purposes of a 'private showing' where access to the original video tape is made available to the union. The Union's basis for establishing the necessity required by § 7114(b)(4)(B) is a need for a 'private showing.' There is no question that such a 'private showing' is of value to the Union. The question presented here is whether the Activity should bear the costs of providing a copy of the video tape for the Union's 'private showing.' Where the Activity has provided the Union access to the original video tape, having otherwise not interfered with all access necessary to the Union, it is not consistent with an 'efficient' government, as required by § 7101(b), to require government agencies and activities to pay the cost of this 'private showing.'

> "There is no obligation under the statute or legislative history to provide, free of charge, any data to the Union. The Respondent is aware of Authority precedent prohibiting the release of data conditioned upon the payment of a reasonable fee. The Respondent makes this assertion to preserve its rights to raise the issue upon appeal." (Respondent's Brief, pp. 2-3).

Respondent's "private showing" argument would be no different whether the data in question was a written document or a video tape. There is at least the same need for a copy of written document, i.e. for a 'private showing', as for a copy of a video tape, and perhaps an even greater need for a copy of a video tape since it would be far more difficult to make notations of all that was seen than to make notes of what appeared in a written document. The right to inspect and copy is well established, e.g., Rules 26(b) and 34 of the Federal Rules of Civil Procedure[6]; by decision under the National Labor Relations Act, The Cincinnati Steel Castings Company, 86 NLRB 592 (1949)[7]; is not questioned here; nor may it be, inasmuch as the Statute requires that,

> "(b) The duty of an agency . . . shall include the obligation --
>
> . . . .

---

[6] Rule 34 provides, in part, that,

> "(a) Scope. Any party may . . . inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form). . . ."

Copying is by the party requesting the data and at that party's cost; but such cost may be recovered if that party prevails and is awarded costs.

[7] The LMRA contains no provision comparable to § 14(b)(4); but the NLRB does not require an employee to furnish such information without cost, absent some evidence of bad faith. Abercrombie & Fitch Co., 206 NLRB 464 (1973).

> "(4) . . . to furnish to the exclusive representative involved . . . data . . . ."
> (5 U.S.C. § 7114(b)(4).

Respondent made at least the segment of the video tape showing the "alleged under ring by Nancy Bundy" available to the Union for viewing and offered to "create a copy of the tape provided the Union would be willing to reimburse Management for any expense incurred." Thus, as Respondent recognizes the "bottom line" is whether Respondent failed to comply with the requirements of § 14(b)(4) and thereby violated §§ 16(a)(1), (5) and (8) of the Statute by failing and refusing to provide the Union a copy of the videotape without cost.

In Veterans Administration Regional Office, Denver, Colorado, 10 FLRA No. 78, 10 FLRA 453 (1982), the Authority held that the agency, or activity, violated its duty to negotiate in good faith, and failed to comply with the requirements of § 14(b)(4), in violation of §§ 16(a)(1), (5) and (8) of the Statute, by requiring payment for a copy of necessary data requested by the union in order to fulfill its representational role in connection with an employee's grievance. Judge Arrigo, in a well reasoned decision and in reliance upon: a) the silence of the Statute, as to the conditions under which the information is to be furnished, including whether a charge may be exacted; b) that the legislative history does not address the matter of a charge for data; c) that no counterpart to § 14(b)(4) existed under the Executive Order and the question of requiring a fee for providing such information had not resolved under the Order; and d) decisions by the National Labor Relations Board which do not require the employer to bear the burden of the cost of duplicating material (10 FLRA at 466-467), had concluded that under the Statute the respondent ". . . was not obligated to provide the Union copies of the documents in question wihtout charge." (10 FLRA at 467). The Authority reversed and stated,

> "Section 7114 of the Statute prescribes the representation rights and duties of the parties in a collective bargaining relationship. Part of an agency's statutory duty to negotiate in good faith, as set forth in section 7114(b)(4) is 'to furnish to the exclusive representative . . . upon request and, to the extent not prohibited by law, data' as further described therein. [footnote omitted]. In using the term 'furnish,'

Congress did not specify either in the Statute or its legislative history whether an agency may assess a charge for such data requested by an exclusive representative. However, noting particularly that the obligation to furnish such data is an integral part of an agency's duty to negotiate in good faith under section 7114(b)(4), as mandated by Congress, the Authority concludes that it would further Congressional intent to require an agency to furnish the data, subject to the limitations and conditions of section 7114(b)(4)(A), (B) and (C), without charge to the exclusive representative.

"Such conclusion is also consistent with the common meaning of the term 'furnish.' In accordance with the general rules of statutory construction, words in the Statute are given their common meaning unless a contrary legislative intent is indicated. [footnote omitted]. There is nothing in the language of the Statute or in the relevant legislative history which suggests that the term 'furnish' as used in section 7114(b)(4) should be given any meaning other than that commonly ascribed to it. In this regard, the common meaning of the term 'furnish' is to provide, supply or give [footnote omitted]. Thus, in the context of section 7114(b)(4), the Authority's conclusion that an agency's obligation to 'furnish' the exclusive representative with a copy of necessary data upon request means to give such data without cost to the exclusive representative is consistent with the literal language of the statute.[8]

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[8] The Judge's discussion of private sector cases in reaching a contrary conclusion is deemed inopposite, noting particularly the absence of any provisions similar to section 7114(b)(4) in the Labor Management Relations Act (LMRA) and the difference between federal and private sector labor Management relations recognized by Congress. See section 7101(b) of the Statute.

> "In addition, the foregoing conclusion gives meaning to section 7114(b)(4), whereas a contrary interpretation would render that section merely duplicative of rights already established under the Freedom of Information Act (FOIA). . .
>
> "Accordingly, contrary to the Judge, the Authority concludes that the Respondent herein violated its duty to negotiate in good faith, and failed to comply with the requirements of section 7114(b)(4), in violation of section 7116(a)(1), (5) and (8) of the Statute, by requiring the Union to pay for a copy of necessary data requested by the Union [footnote omitted] in order to fulfill its representational role in connection with an employee's grievance. [footnote omitted]. (10 FLRA at 456-458).

Veterans Administration Regional Office, Denver, Colorado, supra, has been consistently followed; however, I am aware that the Authority has stated, for example in Bureau of Alcohol, Tobacco and Firearms, National Office, Washington, D.C., 18 FLRA No. 74, 18 FLRA 611, 613 (1985); U.S. Equal Employment Opportunity Commission, Washingtom D.C., 20 FLRA No. 37, 20 FLRA 357, 358 (1985), that:

> "The duty to supply data under section 7114(b)(4) thus turns upon the nature of the request and the circumstances in each particular case."

Although such statement did not relate to furnishing a copy of data without charge to the exclusive representative, I have no doubt that in a proper case the difficulty and cost of producing a copy, together with the circumstances of use and access to the original data afforded would be proper considerations; but that is not presented in this case. Respondent permitted the Union to view only a short 30 second segment of the video tape and only in the presence of various management officials, which prevented detailed and careful analysis; inhibited frank and open discussion by Union representatives; afforded no opportunity for the Union to show the video tape to other necessary representatives and employees to evaluate the procedures shown; to correlate visual transaction with cash register tape entries; or, indeed, to evaluate the presumed identity of Ms. Bundy as the person on the video tape. Moreover, the only cost shown was the estimated $4.00 to $6.00 cost for a video tape cassette. Although the VCRs would have to be started, once started the process is automatic. Further, the video tape cassette, when no longer required, is fully reusable and could be returned for further use. Respondent does not deny its capacity, whether by its surveillance specialists or by use of VCRs at the Exchange, to produce a copy of the video tape -- indeed, Respondent stated, ". . . we would create a copy of the tape provided the Union would be willing to reimburse Management for any expense incurred."

Respondent conceded the need of the Union to examine the cash register tape used on the day of the alleged under ring and, eventually, furnished a copy of a short segment of the cash register tape which concerned the particular transaction. The record does show that to copy the entire cash register tape would be difficult and the copy of poor quality. The record devoted scant attention to either the asserted need or desire of the Union for a copy of the entire cash register tape for the day in question. Accordingly, I shall order the entire cash register tape for the day in question to be made available to the Union for its examination and, further, that a copy of such portions as requested by the Union be furnished.

Accordingly, having found that Respondent failed to comply with the requirements of § 14(b)(4) of the Statute and thereby violated §§ 16(a)(1), (5) and (8) of the Statute by its refusal to furnish the Union a copy of necessary data requested in order to fulfill its representational role in connection with an employee's grievance, I recommend that the Authority adopt the following:

ORDER

Pursuant to § 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7), and § 2423.29 of the Regulations, 5 C.F.R. § 2423.29, the Authority hereby orders that Army and Air Force Exchange Service, Dallas, Texas, shall:

1. Cease and desist from:

(a) Failing and refusing to provide, without charge to the American Federation of Government Employees, AFL-CIO, Local 1345 (hereinafter referred to as "Local 1345"), the employees' exclusive representative, a copy of the data requested by Local 1345 relating to disciplinary action against employee Nancy Bundy.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Provide, without charge, to Local 1345 a copy of the video tape for July 3, 1985, the day on which the alleged under ring by Nancy Bundy occurred.

(b) Make available for inspection by Local 1345 the entire cash register tape for the cash register used by Nancy Bundy on the day of the alleged under ring by Nancy Bundy and provide, without charge, to Local 1345 a copy of such portions of said cash register tape as Local 1345 may designate.

(c) Post at its facilities at the Army and Air Force Exchange Service, Fort Carson, Colorado, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by an appropriate official of the Army and Air Force Exchange Service, Fort Carson, Colorado, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The appropriate official shall take reasonable steps to insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to § 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region VII, Federal Labor Relations Authority, Suite 310, 535 16th Street, Denver, Colorado 80202, in writing, within 30 days of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that that portion of the Complaint which relates to Local 1345's request for data of August 23, 1985, be, and the same is hereby, dismissed.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: May 15, 1986
Washington, D.C.

(24 FLRA No. 36)

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to provide, without charge to the American Federation of Government Employees, AFL-CIO, Local 1345 (hereinafter "Local 1345"), our employees' exclusive representative, a copy of the requested data relating to disciplinary action against employee Nancy Bundy.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL provide, without charge, to Local 1345 a copy of the video tape for July 3, 1985, the day on which the alleged under ring by Nancy Bundy occurred.

WE WILL make available for inspection by Local 1345 the entire cash register tape for the cash register used by Nancy Bundy on the day of the alleged under ring by Nancy Bundy, and we will provide, without charge, to Local 1345 a copy of such portions of said cash register tape as Local 1345 may designate.

____
(Agency or Activity)

Dated: ________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 7, whose address is: 535 - 16th Street, Suite 310, Denver, Colorado 80202 and whose telephone number is: (303) 837-5224.

9/case 408

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 408 REPORT OF CASE DECISIONS December 5, 1986

UNFAIR LABOR PRACTICE CASES

24 FLRA No. 37 (December 5, 1986)

National Federation of Federal Employees, Washington, D.C. and Henry M. Thompson, an Individual, Case No. 4-CO-20019

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DEPOSITORY 376

24 FLRA No. 38 (December 5, 1986)

United States Department of Defense, Department of the Air Force Headquarters, Air Force Training Center (ATC) Lackland Air Force Base, Texas and American Federation of Government Employees, Local 1367, AFL-CIO, Case No. 6-CA-40408

24 FLRA No. 39 (December 5, 1986)

International Association of Machinists and Aerospace Workers, Local 39, AFL-CIO and Roy G. Evans, an Individual, Case No. 4-CO-20034

Y 3.F 31/21-3:

Federal Labor Relations Authority

24 FLRA No. 37

NFFE and HENRY M. THOMPSON,
Case No. 4-CO-20019 (Decided
December 5, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
MERIT SYSTEM PROTECTION BOARD	7114(a)(1)
UNION REPRESENTATION BEFORE MSPB	7116(b)(1) and (8)
REPRESENTATION BY UNION OF EMPLOYEE	
EMPLOYEE'S RIGHT TO UNION REPRESENTATION	
MSPB PROCEEDINGS	
LEVEL OF DUTY OF FAIR REPRESENTATION	
ACTIONS THAT RESULT IN AN OBLIGATION	
STANDARDS FOR DETERMINING A BREACH OF THE DUTY OF FAIR REP.	
ARBITRARY/BAD FAITH ACTION RESULTING IN DISPARATE TREATMENT	
UNION ULP (ALLEGED) 7116(b)(8) 7114(a)(1)	

DIGEST NOTES

The national office of a labor organization may be held responsible for a violation of the duty to fairly represent an employee even if it is not the recognized collective bargaining agent of the employee. The Authority held that where, by its actions, the national office of a union functions as the agent of a local union which has collective bargaining responsibilities for an employee, the national office can be held responsible for representational obligations under 7114(a)(1).

A labor organization has no statutory duty to represent an employee in a Merit System Protection Board (MSPB) proceeding. But, if a union chooses to do so, it must do so without discrimination and without regard to union membership. In this case, the union indicated that it would represent an employee but then failed to appear at the MSPB hearing. The Authority held that the union did not violate sections 7114(a)(1) and 7116(b)(1) and (8).

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

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Even if the union had a duty to represent an employee in a MSPB proceeding, its conduct in failing to appear at the hearing did not constitute a breach of its duty of fair representation under 7114(a)(1), the Authority held. Where union membership is not a factor, the standard for determining whether an exclusive representative has breached its duty of fair representation under section 7114(a)(1) is whether the union deliberately and unjustifiably treated one or more bargaining unit employees differently from other employees in the unit. That is, the union's actions must amount to more than mere negligence or ineptitude, the union must have acted arbitrarily or in bad faith, and the action must have resulted in disparate or discriminatory treatment of a bargaining unit employee.

Federal Labor Relations Authority

24 FLRA No. 38

DOD, Dep't of the Air Force, H.Q., Air Force Training Center, Lackland Air Force Base, Texas and AFGE, Local 1367, Case No. 6-CA-40408
(Decided December 5, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
AGENCY ULP (ALLEGED) 7116(a)(5)	7106
INFORMATION	7116(a)(1) and (5)
NOTIFICATION	7118
INFORMATION, EMPLOYEE AND UNION RIGHTS UNDER THE STATUTE	
SPECIFICITY OF INFORMATION PROVIDED UNION	
INCOMPLETE INFORMATION	
NOTIFICATION OF UNION	
AMOUNT OR TIMELINESS OF ADVANCE NOTICE	
OTHERWISE ADEQUATE TIME ANNULLED BY INCOMPLETE INFORMATION	
UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS	
BARGAINING ORDER	

DIGEST NOTES

The activity violated section 7106(a)(1) and (5) when it failed to provide adequate information in a timely manner to the union concerning its new "Performance Management Program". The new program comprised nearly 200 pages of regulations covering 17 major changes included the implementation of a performance management concept; pay-for-performance concept; establishment of an initial 90 appraisal period; two annual appraisal cycles; new requirements regarding supervisory safety and health responsibilities; new critical performance elements; more requirements for quality control review and several other changes. Although the activity notified the union of the new plan almost a month before implementation, the activity provided incomplete information about the change at the only meeting between the parties concerning the new plan. Furthermore the activity misled the union by stating that the union would be provided additional information at another meeting that was never held. Rather, just two working days before implementation, the union was informed that there would be no further discussions on the matter. The union then requested negotiations and postponement of implementation of the new plan, one day prior to implementation. But the activity responded by claiming that the submission was too late and refused to negotiate.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

24 FLRA No. 39

IAM, Local 39 and Roy G.
Evans, Case No. 4-CO-20034
(Decided December 5, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
REPRESENTATION BY UNION OF EMPLOYEE	7114(a)(1)
STANDARDS	7116(b)(1) and (8)
ARBITRARY/BAD FAITH ACTION	7118
UNION ULP (ALLEGED) 7116(b)(8) 7114(a)(1)	7121(b)(3)(B)
UNFAIR LABOR PRACTICES, REMEDIES FOR UNION VIOLATIONS	
REMEDIAL NOTICE	
POST IN THE UNION'S BUSINESS OFFICE	
PROVIDE AGENCY WITH SIGNED COPIES OF NOTICE FOR POSTING	
REPRESENT ALL UNIT EMPLOYEES FAIRLY	
SEEK PERMISSION FROM ACTIVITY TO FILE A LATE GRIEVANCE	
REIMBURSE EMPLOYEE FOR EARNINGS LOST	

DIGEST NOTES

The union breached its duty of fair representation under section 7114(a)(1) when it deliberately and unjustifiably failed to file a grievance to appeal the suspension of a unit employee within the specified time limits. The union's chief steward assured the employee that he would file a grievance for the employee. But despite repeated attempts by the employee to speak to the chief steward about the grievance during the period that it could have been filed, the chief steward failed to file the grievance. In this manner the union misled the employee into thinking that the union was going to file the grievance, and his reliance on the union caused him to loose the right to file a timely grievance on his own behalf under 7121(b)(3)(B). This treatment was different than the treatment of other unit employees. Consequently, the Authority held that the union violated sections 7116(b)(1) and (8).

The Authority has previously held that where union membership is not a factor, the standard for determining whether an exclusive representative has breached its duty of fair

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

representation under section 7114(a)(1) is whether the union deliberately and unjustifiably treated one or more bargaining unit employees differently from other employees in the unit. That is, the union's actions must amount to more than mere negligence or ineptitude, the union must have acted arbitrarily or in bad faith, and the actions must have resulted in disparate or discriminatory treatment of a bargaining unit employee.

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24 FLRA No. 37

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, WASHINGTON, D.C.

Respondent

and

Case No. 4-CO-20019

HENRY M. THOMPSON, AN INDIVIDUAL

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Decision of the Administrative Law Judge filed by the General Counsel and cross-exceptions filed by the Respondent. The Respondent also filed an opposition to the General Counsel's exceptions. The complaint alleged that the Respondent, the National Federation of Federal Employees, Washington, D.C. (NFFE National), breached its duty of fair representation under section 7114(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute) and thereby violated section 7116(b)(1) and (8) of the Statute when it failed to represent the Charging Party, Henry M. Thompson, in a proceeding conducted by the Merit Systems Protection Board (MSPB).

We conclude, for the reasons discussed below, that the Respondent did not violate section 7116(b)(1) and (8) and therefore did not commit an unfair labor practice.

II. Facts

Thompson was employed by the U.S. Coast Guard in Miami Beach, Florida in the collective bargaining unit represented by Local 1485 of the National Federation of Federal Employees, an affiliate of NFFE National. Following Thompson's removal from employment on September 11, 1981, he wrote to NFFE National and requested representation at his MSPB appeals hearing on his discharge. NFFE National replied that its policy was not to provide such representation from the National Office level, but that it would in his case ask his Local Union (Local 1485) and a National Representative located in Florida to provide him assistance.

On October 4, 1981, Thompson received an order from MSPB setting his hearing for November 24. Through Local 1485, Thompson sought assistance from National Representative Bob Brown. Brown, who worked out of Orlando, Florida, met with Thompson in Miami in late October, agreed to assist him in his MSPB hearing, and told Thompson that he would contact him the next day. Brown did not contact Thompson, and on November 5 Thompson wrote Brown that the hearing was set for November 24. Brown was not able to be present at that time and suggested through Local 1485 that Thompson ask for a postponement of the hearing. Thereafter, MSPB scheduled the hearing for December 16 in Miami. Brown told Thompson that he would be available for the hearing on that day.

The hearing was later rescheduled by MSPB for Atlanta, Georgia, on February 24, 1982. Thompson notified Brown of this rescheduled date and location by phone. During the conversation, Brown told Thompson that the National Representative in Atlanta was being transferred. Thompson asked if Brown would be present at his hearing. Brown stated that if he could not attend the Atlanta hearing, another representative would. Unable to reach Brown by phone on several occasions in January, Thompson sent a letter to Brown on February 3, indicating that the MSPB hearing was set for February 18 in Atlanta and requesting representation by a qualified union representative. Thompson received no further assistance nor did he have any further contact with anyone from the Union before the MSPB hearing, at which Thompson appeared on his own behalf. The parties stipulated that NFFE National's conduct in this matter was not motivated by malice.

III. The Judge's Findings

The Judge found that the case presented three issues: (1) may NFFE National be held responsible for a violation of the duty to fairly represent an employee when it is not the recognized collective bargaining agent of the employee involved; (2) if the National has the duty to represent the employee, does the duty extend to proceedings before the MSPB; and (3) if the duty exists, what standard of conduct is to be used to ascertain whether that duty was breached.

As to the first issue, the Judge found that since NFFE National was not the exclusive representative for the unit in which Thompson was employed, it had no duty under section 7114(a)(1) of the Statute notwithstanding the fact that

Local 1485 is an affiliate of the National. Second, the Judge found that, assuming that the National could be held responsible for the violations alleged in the complaint, it has no duty to represent employees in MSPB proceedings in any event and therefore could not have breached any duty to represent Thompson. The Judge stated that if the National agreed to volunteer its services to Thompson, the matter was one of concern strictly between Thompson and the National and any question of the National's duty in that situation should not be resolved in this unfair labor practice forum.

Finally, the Judge found that in view of his conclusions as to the first two issues, he did not have to reach the question of what standard of conduct a union would be charged with in fulfilling its duty to represent employees in the collective bargaining unit and whether the National failed to meet that duty. He went on to state, however, that such a duty under the Statute exists and, but for his earlier conclusions, he would find that the National's failure to be present at the MSPB hearing, after having agreed to represent Thompson and no good cause having been found which would excuse or explain the National's failure to appear, would constitute arbitrary and capricious conduct in violation of the Statute.

In view of his findings and conclusions, the Judge recommended that the Authority dismiss the complaint.

IV. Positions of the Parties

The General Counsel excepted to the Judge's conclusions as to the first and second issues and to his conclusion that the National was blameless in the circumstances of this case. The Respondent, NFFE National, agreed with the Judge's decision except as to his conclusion on the third issue that the National's failure to appear at the MSPB hearing was arbitrary and capricious.

V. Analysis

As to the first issue, we find, contrary to the Judge, that as a result of its actions in this case NFFE National may be held responsible for the violations alleged in the complaint. While Local 1485 was the certified representative of the unit in which Thompson was employed, NFFE National acted as an agent for Local 1485 throughout the proceedings in this matter, and therefore was fully responsible for the duties it assumed on behalf of Local 1485. See, for example, National Treasury Employees Union and National Treasury

Employees Union Chapter 204, 18 FLRA No. 36 (the Authority found that the local chapter acted as the agent for the exclusive representative, and held that both the local chapter and the exclusive representative violated section 7114(a)(1) and thereby violated section 7116(b)(1) and (8)).

With respect to the second issue, we agree with the Judge that the Respondent had no statutory duty to represent employees in MSPB proceedings. Although a union has no statutory obligation to represent employees in MSPB proceedings, it is our view that if a union chooses to do so, it must do so without discrimination and without regard to union membership. National Treasury Employees Union and National Treasury Employees Union Chapter 121, 16 FLRA 717 (1984), enforcement denied, NTEU v. FLRA, 800 F.2d 1165 (D.C. Cir. 1986). In this case, the parties stipulated that Respondent's conduct was not motivated by malice, and nothing in the record indicates that Respondent's conduct was discriminatory or was undertaken with regard to union membership.

Finally, as to the third issue, we find that even if Respondent had a duty to represent Thompson in the MSPB proceeding, Respondent's conduct did not constitute a breach of its duty of fair representation under section 7114(a)(1) of the Statute. In National Federation of Federal Employees, Local 1453, 23 FLRA No. 92 (1986), the Authority recently addressed in detail for the first time the nature of an exclusive representative's duty of fair representation where union membership is not a factor. The Authority set forth the following standard:

> [W]here union membership is not a factor, the standard for determining whether an exclusive representative has breached its duty of fair representation under section 7114(a)(1) is whether the union deliberately and unjustifiably treated one or more bargaining unit employees differently from other employees in the unit. That is, the union's actions must amount to more than mere negligence or ineptitude, the union must have acted arbitrarily or in bad faith, and the action must have resulted in disparate or discriminatory treatment of a bargaining unit employee.

The Authority concluded in NFFE, Local 1453 that under the standard described the Respondent did not violate section 7114(a)(1) of the Statute and, therefore, did not violate section 7116(b)(1) and (8) as alleged in the complaint.

Similarly, we find that the Union's actions in this case do not meet the standards set forth in NFFE, Local 1453 for finding an unfair labor practice. While the General Counsel argues that the Union's failure to appear resulted from "internal Union disorganization" and "lax administration," the General Counsel has neither alleged nor established that the Respondent deliberately and unjustifiably treated Thompson differently from other bargaining unit employees. The record does not establish that the Respondent acted arbitrarily or in bad faith. Rather, we find that the Union's failure to appear at the MSPB hearing constituted nothing more than mere negligence or miscommunication.

VI. Conclusion

Accordingly, the Authority finds that the Respondent did not violate section 7114(a)(1) of the Statute, and consequently did not violate section 7116(b)(1) and (8) of the Statute. Therefore, we shall dismiss the complaint.

ORDER

The complaint in Case No. 4-CO-20019 is dismissed.

Issued, Washington, D.C. December 5, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(24 FLRA No. 37)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

NATIONAL FEDERATION OF FEDERAL :
EMPLOYEES, WASHINGTON, D.C. :
:
Respondent :
:
and : Case No. 4-CO-20019
:
HENRY M. THOMPSON, AN INDIVIDUAL :
:
Charging Party :
:
. . . .

Catherine Waelder, Esq.
For the Respondent

Linda J. Norwood, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq.

Upon an unfair labor practice charge filed by Henry M. Thompson, an individual, the General Counsel of the Authority, by the Regional Director for Region IV, issued a Complaint and Notice of Hearing alleging that National Federation of Federal Employees, Washington, D.C. (herein sometimes referred to as Respondent, NFFE or the National) violated section 7116(a)(1) and (8) of the Statute when it failed to represent Mr. Thompson in a proceeding conducted by the Merit Systems Protection Board (herein MSPB).

A hearing on the Complaint was conducted at which time Respondent and the General Counsel were represented by counsel and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by counsel and have been duly considered.[1]

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[1] Counsel for Respondent's unopposed Motion to Correct Transcript regarding minor matters is hereby granted.

Upon the entire record in this matter, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material herein Local 1485 of the National Federation of Federal Employees (herein Local 1485) has been the exclusive collective bargaining representative of various employees of the U.S. Coast Guard including employees located in Miami Beach, Florida. Local 1485 is affiliated with the National Federal of Federal Employees, Washington, D.C.[2].

Henry M. Thompson was employed by the U.S. Coast Guard in Miami Beach, Florida in the collective bargaining unit represented by Local 1485 for approximately 6 years.[3] In June 1981 he received from the Coast Guard a notice of proposed removal. The Coast Guard charged Thompson with unauthorized absences, falsification of his attendance record and attempting to deceive through false written and oral statements. Thereafter Thompson, a member of Local 1485 throughout his employment with the Coast Guard, requested Local 1485 President Evan Miller to accompany him when Thompson made his oral reply to the proposed action before the agency. Thompson and Evans appeared for the oral reply and during the meeting Miller made representations on Thompson's behalf. However, the charges were upheld by the 7th Coast Guard District Commander and on September 4, 1981, Thompson was removed from employment.

On September 11, 1981, Thompson wrote to James M. Peirce, President of the National Union, related the background of his discharge and requested that NFFE represent him at his MSPB appeals hearing on the discharge. Thompson asked that a NFFE lawyer or qualified person familiar with removal appeals be supplied for this purpose. By letter dated September 22, President Peirce responded to Thompson and informed him that assistance would be provided by the National. The letter stated, in relevant part:

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[2] As an affiliate, a portion of Local 1485 members' dues is forwarded to the National.

[3] The unit is described in a collective bargaining agreement between Local 1485 and the Coast Guard which became effective in August 1977.

"Ordinarily, all requests for assistance should be communicated through the Local President in writing. Since this is such a short time frame here, however, we will not require the strict adherence to this policy. The NFFE Executive Council has implemented criteria for making the determination when someone from the National Office will personally handle a pending matter. This policy is necessary due to our very limited resources and the size of the workload routinely received at the National Office regarding matters other than representation which affect our Locals nationwide.

"Your appeal is indeed important to us. However, it does not fall within the criteria outlined by the Executive Council to warrant National Office personnel exclusively handling the appeal, as it does not affect your Local nor NFFE as a whole. This does not in any way mean that we will not be involved.

"I recommend that both you and your Local President speak with the NFFE National Representative who services your Local. His name is Bob Brown and he is quite knowledgeable in handling cases of this type. We will notify Mr. Brown that your case will be pending and that his advice and expertise should be made available to you.

"Staff Attorney Edwin Harvey has spoken with Local President Evans Miller regarding your situation. He has advised Evans that you should submit an appeal to the Merit Systems Protection Board to preserve your right to appeal the separation action since you possess all the information which is necessary to do so and since you indicated to Evans your intent to file the appeal. Should you require advice relating to the appeal prior to your being contacted by Mr. Brown, Please talk with Mr. Miller and have him contact us at his earliest opportunity."

On October 4, 1981, Thompson received an order from the MSPB which indicated that his hearing was set for November 24. Thompson thereupon related this information to Local 1485 President Miller and Miller called National Representative, Bob Brown[4/] and informed him that while Thompson was not interested in having the Local Union represent him before the MSPB, he wished to meet with Brown. Brown was scheduled to be in the Miami area in late October and agreed to meet with Thompson at that time. Miller related the message to Thompson.

[4/] Brown works out of Orlando, Florida and is employed by the National Union. His official title is Division Director and he is responsible for the supervision of three National Representatives in the Civil Service Regions within his jurisdiction, as well as personally serving 22 local unions in Florida, including Local 1485 and one local in Alabama. Brown's duties include giving assistance and aid to local unions in negotiations and other matters as requested.

Thompson met with Brown on October 29 or 30, 1981, in a Miami motel.[5] During the approximately 45 minute meeting, Thompson explained the background of his situation to Brown and produced various documents related to his case and asked Brown to help him.[6] Brown reviewed the matter with Thompson and indicated that he had experience in handling this type of case and agreed to assist Thompson in his hearing before the MSPB.[7] Brown told Thompson he would contact him on the following day and meet to discuss the case further.

Brown did not contact Thompson and on November 5, 1981, Thompson wrote to Brown. His letter, a copy of which was sent to Miller, stated:

> "The appeal hearing on my removal is set for November 24, 1981, at 9 A.M. I request that I be represented at this hearing by a Union attorney or a qualified and competent Union representative that is knowledgeable about the rules, regulations and procedures concerning a removal appeal hearing. A place has not been set for this hearing as yet. Please reply as soon as possible as time is of the essence."

Thereafter, Thompson heard from Miller and was told that Brown was not able to be present at the November 24 MSPB hearing and Brown had suggested that Thompson ask the MSPB for a postponement of the hearing. Thompson contacted MSPB on November 10 and requested a ten-day postponement. Subsequently the Coast Guard also sought a postponement and by Order dated December 4, 1981, the MSPB set the matter to be heard on December 16 in Miami, Florida. Thompson called Brown and informed him of the December 16 hearing date and Brown replied that he would be available for the hearing on that day.

Sometime before December 16, 1981, Thompson received notification from MSPB that the December 16 hearing date would be cancelled due to lack of funds. In late December or early January 1982, Thompson received word from MSPB that his hearing would be held in Atlanta, Georgia on February 24, 1982. Thompson called Brown and notified him of the new date and that the MSPB ordered the hearing for Atlanta.[8] During the conversation Brown told Thompson that the Atlanta representative was being transferred to a better position in California. Thompson voiced concern as to how that might affect his case and asked if Brown would be present at his hearing. Brown replied that if he could not be there, another representative would. Thompson asked if the other person would be a qualified representative. Brown responded: "Certainly."

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[5] Brown called Miller and had him notify Thompson of the time and place of the meeting.

[6] In this and other testimony herein, where there is a variance in the testimony, for the most part I have relied on Thompson's testimony over that of Brown or Miller. I found Thompson's testimony to be generally more plausible and more specific, direct, consistent and responsive to the questions asked.

[7] Brown had never appeared at an MSPB hearing but had experience in other types of hearings.

According to Thompson, during the month of January he attempted to reach Brown by telephone approximately five times but Brown's telephone went unanswered. In early February 1982, Miller called Thompson with regard to Thompson paying his Union dues. During the conversation Thompson indicated that he was having difficulties contacting Brown. Miller suggested Thompson contact Brown by mail. On February 3, Thompson sent Brown a letter by certified mail which indicated that his MSPB hearing set for February 18, 1982 at 8:30 a.m. in the MSPB hearing room in Atlanta, Georgia. As he did in his prior letter of November 4, 1981, supra, Thompson requested that he ". . . be represented . . . by a Union attorney or qualified and competent Union representative that is knowledgeable about the rules, regulations and procedures at a removal appeal hearing." Thompson again sought a reply "as soon as possible" noting time was of the essence.

Brown received the letter on February 5, 1982, or shortly thereafter. However, according to Brown, whose testimony on this matter I do not credit, he had a telephone conversation with Thompson on February 4, 1982, and at that time indicated that a Union representative in Atlanta was on "standby" and, if she had no other hearing or election commitments, she would meet with Thompson prior to the hearing. Thompson was to let Brown know where he would be staying and Brown would contact the Atlanta representative as to where she should contact Thompson. However, according to Brown, Thompson never again contacted him and, in any event, unknown to Brown, the Atlanta representative was transferred to California before February 18.

Thompson received no further assistance nor did he have any contact with anyone from the Union prior to his MSPB hearing in Atlanta on February 18, 1982, at which he appeared on his own behalf.[9] By decision of April 26, 1982, and final order of March 22, 1983, the MSPB affirmed Thompson's removal action.

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[8] This conversation is denied by Brown.

[9] The parties stipulated that Respondent's conduct in this matter was not motivated by malice.

Discussion and Conclusions

Essentially three issues are presented in this case: (1) May the National Union be held responsible for a violation of the duty to fairly represent an employee when it is not the recognized collective bargaining agent of the employee involved; (2) If the National has the duty to represent the employee, does the duty extend to proceedings before the MSPB and; (3) If the duty exists, what standard of conduct is to be used to ascertain whether that duty was breached.

The National Union as Respondent

Section 7114(a)(1) of the Statute provides:

> "A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership."

It is clear from the language of section 7114(a)(1) that the Statute grants exclusive representation rights to the exclusive representative. In my view it follows, therefore, that it is only at the level of exclusive representation that the right to represent employees exists. Cf. Department of Health and Human Services, Social Security Administration, 6 FLRA 202 (1981), at 204 where the Authority stated: ". . . the mutual obligation to bargain as articulated in the Statute exists only at the level of exclusive recognition with respect to conditions of employment which affect any employees within the unit . . ." (Emphasis added). Section 7114(a)(1) also imposes on the exclusive representative the duty to represent the interests of employees, but limits that duty to employees in the collective bargaining unit it represents. Therefore, where a union is not the exclusive collective bargaining representative, it has neither the Statutory right to represent the employees in that unit nor the obligation or duty to represent those employees. Thus, the duty to represent employees is co-extensive with a union's right to represent those employees. Cf. Humphrey v. Moore, 375 U.S. 335, 342 (1964), where the Supreme Court, when considering a union's rights and obligations which arose under Section 301 of the National Labor Relations Act, stated: "The undoubted broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contracted is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation . . ." (Emphasis added).

Notwithstanding that Local 1485 is an affiliate of the National Union, forwards a portion of members' dues to the National and receives assistance from a National representative in various matters, Local 1485 is the exclusive collective bargaining representative for the unit in which Thompson was employed. The collective bargaining agreement covering that unit is between Local 1485 and the Coast Guard. It is only Local 1485, and not the National, which has the right to represent employees in the unit in matters which arise out of the employment relationship by virtue of its status as the exclusive representative. Similarly, it is only Local 1485, and not the National, which has a correlative duty to represent unit employees in such matters.

The National became involved in Thompson's case when it, upon request by Thompson, volunteered the services of National Representative Brown to make available his "advice and expertise", and Brown indicated he would assist Thompson during the MSPB hearing. However, any Statutory duty to represent owed to Thompson was owed by Local 1485 and not the National. By volunteering Brown's services the National may have become the agent of the Local for the purpose of representing Thompson at the MSPB hearing, but this did not make the National Thompson's Statutory representative. That right and duty remained with the Local, the exclusive representative.

Accordingly, since the Complaint herein names only the National as the Respondent and the National was neither the exclusive representative nor a party to the collective bargaining agreement, I conclude that the National was not a proper respondent under the Statute and the Complaint herein must be dismissed. See Baker et al. v. Newspaper and Graphic Communications Union, Local 6, et al., 628 F. 2d 156, 165 (D.C. Cir. 1980).

The Duty to Represent at MSPB Proceedings

Assuming arguendo that the National Union can be held responsible for the violations alleged in the Complaint, I would nevertheless conclude that no breach of any duty to represent Thompson occurred herein. As stated above, the duty to represent is coextensive with the right to represent and, in my view, a union has no obligation to represent an employee in matters wherein the Union has no right to represent the employee. Thus, if a union does not have a specific statutory or contractual right to pursue a matter, it should not have any statutory obligation to act. Such an approach would give a balanced meaning to the Supreme Court's usage of "equal scope" in Humphrey v. Moore, supra, when it discussed a union's representative responsibility vis a vis its authority in such matters. Accordingly, where no right to pursue a matter in a particular forum exists, a union should not be found to have violated the Statute by its refusal to act, failure to act, or even by acting discriminatorily or improperly. The situation would simply be outside the purview of Statutory considerations.[10]

In the case herein the Union had no independent right under the Statute or by contract to appear before the MSPB to argue or present a case.[11] The right to have his removal action brought before the MSPB was Thompson's and arose separate and apart from the rights granted to the Union by the Statute or negotiated into the collective bargaining agreement.[12] Accordingly, I would conclude that since access to the MSPB was Thompson's right and Thompson's right alone, the Union cannot be held to have violated the Statute by its actions or lack thereof in connection therewith. If the Union agreed to volunteer its services to Thompson the matter was one of concern strictly between Thompson and the Union and any question of the Union's duty in that situation should not be resolved in this forum.

In view of my conclusions herein I need not reach the question of what standard of conduct a union should be charged with in fulfilling its duty to represent employees in the collective bargaining unit and whether the Union herein failed to meet that duty.[13] However, it would appear that such a duty under the Statute exists and, but for my conclusions, *supra*, I would find that the Union's failure to be present at the MSPB hearing, after having agreed to represent Thompson and no good cause having been found which would excuse or explain the Union's failure to appear at the hearing, would constitute arbitrary and capricious conduct violative of the Statute.

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[10] This approach would comport with that taken by Judge Burton S. Sternburg in *American Federation of Government Employees, AFL-CIO*, 3-CO-20003, OALJ-82-131 (September 16, 1982).

[11] To the extent that *National Treasury Employees Union*, 10 FLRA 519 (1982), might suggest a different conclusion, in that case the removal actions involving non-union Nuclear Regulatory Employees were before the agency and not before the MSPB.

[12] Compare *American Federation of Government Employees, Local 1778, AFL-CIO*, 10 FLRA 346 (1982), involving workmens' compensation claims, which subject was encompassed by the parties collective bargaining agreement and a union official was granted official time for handling such matters.

[13] Compare *American Federation of Government Employees, Local 987*, 3 FLRA 715 (1980). For a thorough discussion of a union's "duty of fair representation", including the evolution of that concept in the private sector, see the decision of Judge Francis E. Dowd in *National Federation of Federal Employees, Local 1453*, 4-CO-20022, OALJ-84-52 (March 23, 1984.

Nevertheless, I would reject Counsel for the General Counsel's request that, as part of the remedy, the Union should pay Thompson for expenses he incurred representing himself. Since there is no showing that Thompson incurred any expenses additional to those incurred in connection with being present at the hearing, which hearing he would have attended in any event, I conclude such remedy would be punative and is therefore impermissible. IBEW v. Foust, 99 U.S. 2121 (1979).

Accordingly, in view of the entire foregoing, I recommend the Authority issue the following:

ORDER

IT IS HEREBY ORDERED that the Complaint in Case No. 4-CO-20019 be, and it hereby is, dismissed.

Salvatore J. Arrigo

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: July 5, 1984
Washington, D.C.

24 FLRA No. 38

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF DEFENSE
DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, AIR FORCE TRAINING CENTER (ATC)
LACKLAND AIR FORCE BASE, TEXAS

Respondent

and Case No. 6-CA-40408

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1367, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached Decision of the Administrative Law Judge filed by the General Counsel. The complaint essentially alleged that Respondent violated section 7116(a)(1) and (5) of the Statute when it failed to provide the Union adequate notice of, or an opportunity to bargain in good faith concerning procedures and appropriate arrangements for adversely affected employees on the implemention of revised Air Force Regulation 40-452, Performance Management Program. We conclude that the Respondent committed the unfair labor practice as alleged.

II. Facts

On June 4, 1983, the Respondent hand-delivered to the Union a letter informing it of a forthcoming revised regulation, AFR 40-452, entitled "Performance Management Program," to be implemented on July 1. A draft of the regulation, consisting of nearly 200 pages including a "Summary of Changes" listing 17 changes in the regulation, was attached to the letter. The Respondent informed the Union that it would explain the regulation and its changes and provide the Union with more information at a later date.

Although the Respondent conducted a briefing on June 13 with the Union, explaining the most important changes of the regulation concerning the Union, the briefing was not completed because the Respondent's representative was unable to answer the Union's questions in detail. During this meeting, the Respondent asked the Union to submit its proposals regarding the revised regulation. The Union replied that the briefing lacked specificity and it could not submit its proposals until the briefing was completed. The Union asked that it be given various Air Force regulations referred to in AFR 40-452, and Respondent replied that they were available in the publication library. Respondent's representative concluded the meeting by saying that he would get back to the Union to finish the briefing. On June 14, the Respondent again asked the Union to submit proposals in writing. Thereafter, the Union was not able to review the regulations mentioned in AFR 40-452 because they were not available in the publication library.

On June 28, when the Union reminded the Respondent's representative that he had not returned to finish the briefing, the representative replied that there would be no further discussions on the matter. On June 29, late on a Friday afternoon, the Union gave the Respondent a letter that requested: (1) negotiation on the impact and implementation of AFR 40-452; and, (2) the postponement of its implementation until after the parties completed negotiations. Upon receipt of the request to negotiate, the Respondent told the Union that the submission was late. The Respondent implemented the regulation on July 1. Subsequently, on July 19, the Union submitted a written list of proposals to the Commander of the Base. No bargaining took place with respect to the regulation.

III. Judge's Decision

The Judge concluded that the Respondent did not violate section 7116(a)(1) and (5) of the Statute as alleged. He found that the Union's request to bargain at the "eleventh hour" was untimely, noting particularly that the request was made on June 29, late on a Friday afternoon just before the proposed implementation of the new regulation on Sunday, July 1. Also, the Judge found that the Respondent: (1) gave the Union adequate notice of the change and the specific details of the regulation to enable the Union to make proposals to management; and (2) requested, on several occasions, the Union to submit proposals. Further, he found that although the Respondent conducted a briefing session with the Union concerning the regulation and indicated its intention to resume briefings, it was not obliged to do so.

Finally, the Judge found that the Union's proposals given to the Base Commander on July 19 would not support a refusal to bargain allegation. He found that the request to bargain after changes were implemented was also untimely.

IV. Positions of the Parties

The General Counsel excepts to the Judge summarily rejecting the need for adequate information needed by the Union for bargaining. The General Counsel contends that the Respondent misled the Union into reliance on a briefing and the availability of documentation, and subsequently abrogated all commitments and refused to bargain with the Union on the matter. The Respondent filed a brief in opposition to the General Counsel's exceptions.

V. Analysis

We find, contrary to the Judge, that the Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to bargain in good faith with the Union concerning procedures and appropriate arrangements for adversely affected employees on the implementation of AFR 40-452. After the Union was notified of the impending changes in the regulation, it requested the Respondent to explain the regulation and its changes as well as provide more information to the Union. The Respondent committed itself to provide the information and to give the Union a briefing. Although a briefing was held on June 13, it was not completed because the Respondent's representative was unable to answer the Union's questions. During the briefing the Respondent's representative asked the Union to submit bargaining proposals. The Union responded that the briefing lacked the specificity it needed to submit proposals and that it could not submit proposals until the briefing was concluded and the changes from the previous regulation had been identified. The Judge credits the testimony of the Union that the Respondent's representative stated that he would get back to the Union to finish the briefing. It was not until June 28, two working days before implementation of the regulation, that the Union was informed that there would be no further discussion of the matter. The Union requested negotiations and postponement of implementation of the regulation on the following day, prior to the date the Respondent established to implement the regulation.

We find that the Union was misled by the Respondent's representative when he stated that he would finish the briefing and provide the Union with additional information necessary for the Union to submit appropriate proposals. It was this failure by the Respondent to provide the necessary information that delayed the Union in submitting bargaining proposals. In these circumstances, the Union's request to bargain was timely. Therefore, we find that the Respondent violated the Statute by failing to bargain in good faith with the Union over procedures and appropriate arrangements for adversely affected employees before it implemented the revised regulation. See Department of the Air Force, Scott Air Force Base, Illinois, 19 FLRA No. 13 (1985). In view of our conclusion, it is unnecessary to address the Judge's conclusion regarding the Union's post-implementation proposals.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and thus affirms those rulings. The Authority has considered the Judge's Decision and the entire record in this case, and adopts the Judge's findings and conclusions only as modified. We find, contrary to the Judge, that the Respondent failed and refused to bargain in good faith with the Union concerning procedures and appropriate arrangements for adversely affected employees on the implementation of AFR 40-452, in violation of section 7116(a)(1) and (5) of the Statute.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority orders that the United States Department of Defense, Department of the Air Force Headquarters, Air Force Training Center, ATC, Lackland Air Force Base, Texas shall:

(1) Cease and desist from:

(a) Failing and refusing to bargain in good faith with the American Federation of Government Employees, AFL-CIO, Local 1367, the exclusive representative of its employees, and affording it the opportunity to bargain concerning procedures and appropriate arrangements of adversely affected employees on the implementation of revised Air Force Regulation 40-452, Performance Management Program.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

(2) Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, bargain in good faith with the American Federation of Government Employees, AFL-CIO, Local 1367, the exclusive representative of its employees, concerning procedures and appropriate arrangements of adversely affected employees on the implementation of revised Air Force Regulation 40-452, Performance Management Program.

(b) Post at its facilities at Lackland Air Force Base copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, Lackland Air Force Base, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said Notices are not altered, defaced or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VI, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C. December 5, 1986

Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to bargain in good faith with the American Federation of Government Employees, AFL-CIO, Local 1367, the exclusive representative of our employees, and afford it the opportunity to bargain concerning procedures and appropriate arrangements of adversely affected employees on the implementation of revised Air Force Regulation 40-452, Performance Management Program.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, bargain in good faith with the American Federation of Government Employees, AFL-CIO, Local 1367, the exclusive representative of our employees, concerning procedures and appropriate arrangements of adversely affected employees on the implementation of revised Air Force Regulation 40-452, Performance Management Program.

____
(Activity)

Dated: ____________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VI, Federal Labor Relations Authority, whose address is: 525 Griffin Street, Suite 926, Dallas, Texas 75202, and whose telephone number is: (214) 767-4996.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

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UNITED STATES DEPARTMENT OF DEFENSE, DEPARTMENT OF THE AIR FORCE HEADQUARTERS, AIR FORCE TRAINING CENTER, ATC, LACKLAND AIR FORCE BASE, TEXAS

Respondent

and Case No.: 6-CA-40408

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1367

Charging Party

. . . .

Charles L. Brower, Lt. Col., USAF
For the Respondent

Susan E. Jelen, Esquire
For the General Counsel

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on August 23, 1985 by the Regional Director for the Federal Labor Relations Authority, Dallas, Texas, a hearing was held before the undersigned on October 29, 1985 at San Antonio, Texas.

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101, et seq. (herein called the Statute). It is based on a Second Amended Charge filed on August 22, 1985 by American Federation of Government

Employees, AFL-CIO, Local 1367 (herein called the Union) against United States Department of Defense, Department of the Air Force Headquarters, Air Force Training Center, ATC, Lackland Air Force Base, Texas (herein called the Respondent).

The Complaint alleged, in substance, that (a) on or about June 28, 1984, and continuing thereafter, Respondent refused to bargain in good faith with the Union over procedures to be observed and appropriate arrangements for adversely affected employees in implementing Air Force Regulation 40-452, Performance Management Program, (b) on or about July 1, 1984 and continuing thereafter, Respondent refused to bargain in good faith with the Union by unilaterally implementing the aforesaid Air Force Regulation 40-452 without providing the Union adequate notice of, or an opportunity, to negotiate over procedures to be observed in implementing the regulation and appropriate arrangements for adversely affected employees - all in violation of Section 7116(a)(1) and (5) of the Statute.

Respondent's Answer, dated September 4, 1985, denied the aforesaid allegations of the Complaint, as well as the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed which have been duly considered.1/

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the

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1/ Subsequent to the hearing the Respondent filed with the undersigned a Motion to Strike Portions of General Counsel's Post-Hearing Brief. In its brief the General Counsel cited Department of the Navy, Naval Ordinance Station, 4 FLRA 760. Respondent, asserting that General Counsel misinterpreted the cited decision and its ratio decidendi, contends that the General Counsel omitted certain language when it quoted Judge Mason, the author thereof. The Motion is denied. Quotations from, or portions of, a cited case as set forth by a party in a brief are part of Counsel's argument. They are not factual in nature, nor may they be deemed an attempt to adduce post-hearing evidence. The undersigned can determine, upon reviewing the cited case, its applicability herein.

testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the Union has been, and still is, the exclusive bargaining representative of all permanent, full time, Air Force civilian employees paid from appropriated funds assigned to Lackland Air Force Base, Texas with specified exclusions from said unit.

2. At all times material herein the Union and Respondent have been parties to a collective bargaining agreement covering the aforesaid unit which is composed of approximately 2300 employees.

3(a). Between 1972 and June, 1985 Frank G. Suarez was president of the Union. At all times material herein Julius Garcia was first vice-president of the Union.

(b) At all times material herein Charles Shinn was Chief of the Respondent's Civilian Personnel Office, Ramon Lopez was Respondent's Chief of Labor Relations, and Anthony Fuentes was Respondent's Chief of Employee Relations.

4. Record facts disclose that between May, 1983 and June, 1984 Respondent changed its employment conditions on various occasions; that it was customary for management to forward the changes with a covering memo signed by Lopez; and that bargaining thereon would normally occur three weeks from the time the Union made a request to bargain.

5. On June 4, 1984[2] Lopez hand delivered to Suarez a letter which informed the Union of a forthcoming new regulation (AFR 40-452) to be implemented on July 1, and an attached draft of the said regulation. Lopez explained that someone would come and explain the regulation and its changes as well as provide more information to the Union. Thereafter, on June 8, Suarez gave the regulation to Garcia for the latter to review and decide if it required negotiations with management.

6. The draft of AFR 40-452, entitled "Performance Management Program", established a program that integrates

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[2] Unless otherwise indicated, all dates hereinafter mentioned occur in 1984.

certain performance, pay, and recognition processes which is applicable to employees in the Lackland unit. As such, it implements requirements of 5 CFR, Part 430 (performance appraisal), Part 540 (merit pay), Part 531 and 532 (within grade increase - WGI), Part 305 (probation) and Part 451 (performance awards). It also implements FPM, Supplement 335-1, pertaining to the use of performance appraisals in promotion.

7. The said regulation, which comprises nearly 200 pages, contains 17 changes. They are as follows:3/

> "SUMMARY OF CHANGES
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> "This publication implements the performance management concept (para 1-2) and the pay-for-performance concept (para 1-3); explains differences in employee coverage (para 1-6b and atch 1); implements a single appraisal form (para 2-1); establishes an initial 90-day appraisal period (para 2-2); sets up two annual appraisal cycles (para 2-3); adds new requirements regarding supervisory safety and health responsibilities (para 2-9c); adds new requirements on critical performance elements (para 2-10); adds additional requirements regarding the quality control review (para 2-13); explains how ratings on work behavior must relate to ratings on performance (para 2-19); explains the requirement to appraise work behavior and how the rating is used (paras 2-17 through 2-30); clarifies the separate probation required for new supervisors and managers (para 4-2); implements new guidance on dealing with performance problems (chap 5); establishes a new cash award for GM employees (para 7-4); authorizes a quality step increase only for superior ratings (para 7-5a); establishes a 1 percent of salary

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3/ The changes in performance management, as contained in AFR 40-452, appear in G.C. Exhibit No. 3 on the page following Chapter 12-3 and in Respondent's Exhibit No. 4 on pages 57-58.

minimum for the SSPA and MPCA (fig 7-1, table 4); and, changes recordkeeping requirements (chap 12)."

8. At the request of Lopez, management official Fuentes came to the Union office on June 13 to conduct a briefing of AFR 40-452. The official stated that it was necessary to implement the new regulation on July 1. Although Garcia inquired why it had to be done so quickly, Fuentes gave no explanation. An overview of the program and its philosophy was covered, and Fuentes called the Union's attention to the most important changes concerning the Union. The most important change, as mentioned by the management representative, dealt with a new system which combined the old Job Performance Appraisal System (JPAS) and the Civilian Potential Appraisal System (CPAS). These were no longer separate and district appraisal processes, and they had to be related to one another. There would be one appraisal during the rating year instead of two separate appraisals.[4]

9. At the briefing on June 13 Fuentes asked the Union if there were any questions re the new regulation. Garcia asked what other changes were introduced by the new program. Fuentes stated he couldn't answer in detail and that he was going to a training session that day but would get back to the Union representatives. Garcia requested that he be given the various Air Force regulations referred to in AFR 40-452, and Fuentes replied they were in the publication library at Lackland. Fuentes asked that the Union submit its proposals re the proposed new regulation. Whereupon Garcia stated the briefing lacked specificity and the Union couldn't submit proposals until the briefing was completed; that the Union could not submit its proposals until Fuentes finished his briefing and pointed out all the

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[4] Garcia testified that Fuentes stated management changed its position re the grievability of performance ratings; that whereas job performance was deemed nongrievable in the past, under this regulation it was grievable. Fuentes denied referring to any such change, and he testified job appraisals were always considered grievable; that the new regulations made no change. While Article XXIII of the collective bargaining agreement, which is entitled "Negotiated Grievance Procedure, purportedly covers this matter, it is clearly a matter of contract interpretation and no change in this respect appears in AFR 40-452.

changes from its past regulation. Whereupon Fuentes said he would get back to the Union.[5]

10. The record reflects that on June 14 Ms. Tommie Holmes, an employee relations specialist, telephoned Garcia. She stated that Fuentes asked her to contact Garcia and tell the latter to send Fuentes the Union's proposals in writing. Garcia replied that he would try to get them ready.

11. Garcia attempted to review the regulations mentioned in AFR 40-452 by going to the library but they were not available. The said regulations were available at the Civilian Personnel Office, but Garcia was advised he could review them only during duty hours and could not have copies thereof.

12. Garcia testified, and I find, that on June 28 he went to see Fuentes at the latter's office and asked for copies of the Federal Personnel Manual. He mentioned that they were lengthy and did not have time to review them. The request was denied. When Garcia reminded Fuentes that the latter had not returned to finish the briefing, the management official stated that, upon advice of Lopez, there would be no further discussion with the Union on this matter; that Ms. Holmes at the Civilian Personnel Office had contacted the Union and requested proposals and there was adequate time to submit same. In reply thereto, Garcia said that Fuentes knew the Union was dealing with him and Lopez. The Union official then said he would submit proposals the next day based on the information had by the Union. Fuentes then told Garcia to "do what you want to, but the agency will not entertain anything, or discuss anything."[6]

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[5] Fuentes denied giving any indication to Garcia that he would come back and finish briefing. His testimony, however, reflects that he gave the impression he would come back if the Union called and needed explanation. Suarez, who was present at the briefing, also testified that Fuentes stated on June 13 he had to leave for training for the new regulation. Further, that Fuentes was making arrangements to come back and talk over AFR 40-452 again with the Union. I credit the versions of what occurred at the briefing as testified to by Garcia and Suarez.

[6] This conversation, as testified to by Garcia, was undenied by Fuentes.

13. After the aforesaid meeting Garcia advised Suarez what had been said thereat. Upon advice from Suarez, the Union president conferred with Al Kia, president of AFGE, Local 3782 which was negotiating with Air Force agency SARPMA[7] over AFR 40-452. Garcia testified he copied some of the proposals submitted by Kia on two yellow pages.

14. On June 29 Garcia gave Fuentes a letter, dated June 28, written by Suarez and addressed to the Commander of Lackland Air Force Base - attention: Charles Shinn. This letter from the Union requested negotiation re the impact and implementation of AFR 40-452, as well as the postponement of its implementation until after the parties finished meeting and completed an agreement. It was suggested therein that the parties meet on July 2. Garcia testified that he also delivered the proposals of the Union, which were handwritten on the two yellow pages, to Fuentes on June 29.[8] Upon receiving the request to negotiate as set forth in Suarez's letter, Fuentes informed Garcia it was late for submission (being late Friday afternoon) since the regulation would be implemented on Sunday, July 1.

15. Respondent did not reply to Suarez's letter of June 28 wherein the Union requested negotiations re the impact and implementation of AFR 40-452. The regulation was implemented on July 1.

16. On July 19 Garcia gave a written list of 12 proposals by the Union, in respect to AFR 40-452, to the secretary of General Smith, the Commander at the Base.[9] These proposals, which were addressed to the Commander, were a typewritten copy (with a few changes) of the proposals

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[7] San Antonio Real Property Maintenance Association.

[8] Fuentes testified that Garcia did not give him anything but the letter (G.C. Exhibit No. 4). In view of the ultimate disposition of the central issue herein, the undersigned concludes it is unnecessary to resolve credibility as to the submission of the handwritten proposals.

[9] The letter containing these proposals, and addressed to the Commander, was dated June 29. Garcia's testimony reflects that the Union so dated the letter because that was the date it submitted its handwritten proposals to Fuentes.

made by Kia on behalf of Local 3782, and which Garcia testified he gave to Fuentes on June 29 on handwritten pages.

17. No bargaining has taken place with respect to the said regulation.

18. In addition to the change resulting from AFR 40-452, whereby employees would no longer receive two separate appraisals during the rating year, but would receive a combined JPAS & CPAS appraisal, two other significant changes affecting employees were made by the new regulation: (a) an initial appraisal period was established, so that employees must be appraised at the end of, but no earlier than, 90 days; (b) the critical elements, which formed the basis for the appraisal and rating of employees, were changed in the new regulation.

Conclusions

It is contended by General Counsel that Respondent violated Section 7116(a)(1) and (5) of the Statute. It predicates this conclusion on the further contentions: (a) that AFR 40-452 was implemented unilaterally without affording the Union adequate notice and a reasonable opportunity to request bargaining on the impact and implementation of the regulation; (b) that management refused to bargain thereon.

Case law in the public sector has established that while an agency may exercise certain management rights, pursuant to Section 7106 of the Statute, an obligation is imposed upon the agency when it changes conditions of employment in exercising such right. In such an instance a union must be provided with adequate notice of the agency's decision and afforded an opportunity to bargain on the impact and implementation of any such change. Department of the Treasury, U.S. Customs Service, Region 1 (Boston, Mass.), 16 FLRA No. 97; U.S. Government Printing Office, 13 FLRA No. 39.

There are, however, correlative obligations imposed upon a union which has been notified of any intended changes by an agency. A union is obliged, in such event, to make a timely request to bargain or seek more time to consider a change. Where the union's request is submitted at the eleventh hour, albeit before the change, it has been held to be untimely. See Customs Service, Region 1 (Boston, Mass), supra; Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 960, 8 A/SLMR 33. Further, a request to bargain *after* the change is implemented has been held untimely and no refusal to bargain will be found. General Services Administration, 15 FLRA No. 6.

Turning to the case at bar, the General Counsel avers that the notice of the proposed implementation of AFR 40-452 was not sufficiently specific or definitive re the contemplated changes. In support of such averment, it is argued by General Counsel that briefings were required to elaborate or explain the new regulation and its changes.

It is true that notice of a decision to change working conditions must be specific, and that a passing reference to a contemplated change will not be deemed adequate notice. Department of the Army, Harry Diamond Laboratories, Adelphi, Maryland, 9 FLRA No. 66; U.S. Department of the Air Force, Air Force Systems Command et. al., 5 FLRA No. 88; Department of the Treasury, Internal Revenue Service, Indianapolis, Indiana, A/SLMR No. 909, 7 A/SLMR 844. However, in the case at bar I am persuaded that the new regulation itself (AFR 40-452), which was given to the Union on June 4, was specific as to the contemplated charges. The summary of changes - as set forth in G.C. Exhibit No. 3 and Respondent's Exhibit No. 4 (following Chapter 12) - specified the 17 proposed changes in the Performance Management Program. In each instance the changed condition of employment was specifically mentioned, i.e. establishing a 90 day appraisal period, implements a single appraisal form, etc. While management did conduct a briefing session in regard thereto, and indicated an intention to resume briefings, I am not convinced that such was obligatory on its part. Further, the fact that discussion ensued re the various changes does not militate against concluding that the notice of the changes, and their specifity, were sufficient. I am satisfied that the purported changes as given to the Union were sufficiently detailed to apprise the bargaining representative of their substance; that such notification thereof was adequate to allow the Union to make proposals to management concerning same.

With respect to the time frame allotted to the Union to request bargaining and submit proposals based on the proposed new regulation, I conclude Respondent has fulfilled its obligation in that regard. Since AFR 40-452 was given to the Union on June 4 with an implementation date of July 1, the Union had 4 weeks advance notice of the contemplated changes. Past decisions by the Authority reveal that substantially less notice by an agency has been deemed adequate. Thus, in Customs Service, Region 1 (Boston, Mass.), supra, 10 days notice of a changed procedure, requiring inspectors to make a phone call to management on completing an assignment, was considered sufficient notification. Also, a 4 day notice of a reduction-in-force of employees was held adequate. United States Department of Defense, Department of the Army, Headquarters, Fort Sam Houston, Texas, 8 FLRA No. 112.

It is also concluded by the undersigned that the Union was afforded a reasonable opportunity to negotiate the changes which were to be implemented on July 1. When Garcia received the proposed regulation on June 4 there was also attached thereto a letter from Lopez asking the Union representative to contact him re same. On June 13, during the briefing conducted by Feuntes, the latter asked Garcia to send management the Union's proposals re AFR 40-452. Again, on June 14 management representative Tommie Holmes called Garcia and requested he submit the Union's proposals. The request for negotiation, which was set forth in a letter from Suarez to the Commander was given to Fuentes on June 29. This was the first time the Union presented its request and it was made on a Friday afternoon just before the proposed implementation of the new regulation on Sunday, July 1. In accord with the cases heretofore cited I conclude that the Union was afforded a reasonable time and opportunity to request bargaining and submit its proposals re the new regulation. While it did ultimately submit such request, this was done at the eleventh hour. Thus, the Respondent was justified in so advising Garcia on June 29 in view of its planned implementation on July 1. The refusal to negotiate at this late date on the impact and implementation of AFR 40-452 was not, in line with past decisional law, a refusal to bargain in violation of 7116(a)(5) of the Statute. See Internal Revenue Service (District, Region, National Office Unit), 14 FLRA No. 92.

Moreover, the proposals given by Garcia to General Smith's office on July 19 will not support a refusal to bargain allegations even though unanswered by Respondent.[10] A request to bargain made after changes are implemented must be considered untimely, and no refusal to bargain by Respondent will be found thereafter. Department of the Army, U.S. Military Academy, West Point, New York, A/SLMR No. 1138, 8 A/SLMR 1163.

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[10] Assuming arguendo, the Union submitted its proposals to Fuentes on June 29, which fact is in dispute, the undersigned would deem the submission untimely. Thus, a refusal to negotiate thereon, in view of the implementation date of July 1, would not be violative of 7116(a)(5).

Accordingly, the undersigned concludes that Respondent did not refuse to bargain with the Union re the implementation of AFR 40-452 in violation of Section 7116(a)(1) and (5) of the Statute.

It is therefore recommended that the Authority issue the following Order:

ORDER

It is hereby Ordered that the Complaint in Case No. 6-CA-40408 be, and the same hereby is, dismissed.

William Naimark
WILLIAM NAIMARK
Administrative Law Judge

Dated: March 13, 1986
Washington, D.C.

24 FLRA No. 39

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE
WORKERS, LOCAL 39, AFL-CIO

Respondent

and

Case No. 4-CO-20034

ROY G. EVANS, AN INDIVIDUAL

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint, and recommending that it be ordered to cease and desist from those practices and take certain affirmative action. The Respondent and the General Counsel filed exceptions to the Judge's Decision.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision, the exceptions to that Decision, and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommended Order as modified.

In National Federation of Federal Employees, Local 1453, 23 FLRA No. 92 (1986), the Authority addressed for the first time the nature of an exclusive representative's duty of fair representation where union membership is not a factor. The Authority set forth the following standard (slip op. at 6):

> [W]here union membership is not a factor, the standard for determining whether an exclusive representative has breached its duty of fair representation under section 7114(a)(1) is whether the union deliberately and unjustifiably treated one or more bargaining unit employees differently from other employees in the unit. That is, the union's actions must amount to more than mere negligence or ineptitude, the union must have acted arbitrarily or in bad faith, and the action must have resulted in disparate or discriminatory treatment of a bargaining unit employee.

Though the Judge made his Decision prior to the issuance of our recent case, the basic standards he applied in making his final determination are the same. Applying our standards to the circumstances of this case, we find that the General Counsel has established that the Union's actions violated the Statute.

In agreement with the Judge, we conclude that the Union's actions misled Evans into thinking that the Union was going to file the grievance, and Evans' reliance on the Union caused him to lose the right to file a timely grievance. We agree with the Judge that the Union's actions amounted to more than mere negligence and conclude that the Respondent deliberately and unjustifiably failed to file a grievance on behalf of Evans. We further conclude, in the absence of a showing to the contrary, that the Union treated Evans differently from other unit employees by failing to file his grievance. By this conduct, the Union breached its duty of fair representation as required by section 7114(a)(1) of the Statute and thereby violated section 7116(b)(1) and (8) of the Statute. Compare National Federation of Federal Employees, Washington, D.C., 24 FLRA No. 37 (1986). That case involved an employee who requested his union to provide him with a representative at a hearing before the Merit Systems Protection Board (MSPB). While the union in that case had initially agreed to provide representation to the employee, the union failed to appear at the hearing, which had been rescheduled several times. Based on the record in that case, we found that the union's failure to appear at the hearing constituted nothing more than mere negligence or miscommunication. Moreover, unlike here, the union's failure to represent the employee in that case did not extinguish the employee's rights.

We also agree with the Judge that the circumstances of this case weigh in favor of the remedy he recommended. See Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972); Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270 (9th Cir. 1983). We have modified the Order to conform to our findings in this case. We have also modified the Notice to conform with like notices where similar violations have been found.

ORDER

Pursuant to section 2423.29 of the Federal Labor Rela-Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the International Association of Machinists and Aerospace Workers, Local 39, AFL-CIO, shall:

1. Cease and desist from:

(a) Failing to fairly represent Roy G. Evans, or any other unit employee, as required by section 7114(a)(1) of the Federal Service Labor-Management Relations Statute.

(b) In any like or related manner interfering with, restraining, or coercing any employee in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Fairly represent all employees in its unit of exclusive recognition, as required by section 7114(a)(1) of the Statute.

(b) Seek permission from the Naval Air Rework Facility, Norfolk, Virginia, to file a late grievance concerning the May 27, 1982 suspension of Roy G. Evans, and pursue the grievance with good faith and all due diligence.

(c) If the Naval Air Rework Facility, Norfolk, Virginia, refuses permission to file a late grievance concerning the May 27, 1982 suspension of Roy G. Evans, pay Evans the amount of earnings lost during the period of his suspension (June 7, 1982 through June 11, 1982).

(d) Post at its business offices and its normal meeting places, including all places where notices to members, and to employees of the Naval Air Rework Facility, Norfolk, Virginia, are customarily posted, copies of the attached Notice on forms to be furnished by the Federal

Labor Relations Authority. Upon receipt of such forms, they shall be signed by the President of International Association of Machinists and Aerospace Workers, Local 39, AFL-CIO and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and all other places where Union notices to members and unit employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(e) Submit appropriate signed copies of such Notice to the Commander of the Naval Air Rework Facility, Norfolk, Virginia, for posting in conspicuous places where unit employees are located, where they should be maintained for a period of 60 consecutive days from the date of the posting.

(f) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IV, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C. December 5, 1986.

J. L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL MEMBERS AND OTHER EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR MEMBERS AND OTHER EMPLOYEES THAT:

WE WILL NOT fail to fairly represent Roy G. Evans, or any other unit employee, as required by section 7114(a)(1) of the Federal Service Labor-Management Relations Statute.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employee in the exercise of their rights assured by the Federal Service Labor-Mangement Relations Statue.

WE WILL fairly represent all employees in our unit of exclusive recognition as required by section 7114(a)(1) of the Federal Service Labor-Management Relations Statute.

WE WILL seek permission from the Naval Air Rework Facility, Norfolk, Virginia, to file a late grievance concerning the May 27, 1982 suspension of Roy G. Evans, and pursue the grievance with good faith and all due diligence.

WE WILL, if the Naval Air Rework Facility, Norfolk, Virginia, refuses permission to file a late grievance concerning the May 27, 1982 suspension of Roy G. Evans, pay Evans the amount of earnings lost during the period of his suspension (June 7, 1982 through June 11, 1982).

____
(Labor Organization)

Dated:____________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region IV, Federal Labor Relations Authority, whose address is: 1371 Peachtree Street, N.E., Suite 736, Atlanta, Georgia 30367, and whose telephone number is: (404) 347-2324.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL 39, AFL-CIO

Respondent

and

Case No. 4-CO-20034

ROY G. EVANS, AN INDIVIDUAL

Charging Party

Barbara Liggett, Esq.
For the General Counsel, FLRA

Coet Combs
For the Respondent

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, herein referred to as the Statute, 92 Stat. 1191, 5 U.S.C. § 7101 *et seq*, and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410, *et seq*.

The Charge in Case No. 4-CO-20034 was filed on August 26, 1982, by Roy G. Evans, an individual, against the International Association of Machinists and Aerospace Workers, Local 39, AFL-CIO (hereinafter referred to as the Union or Respondent). A First Amended Charge was filed on November 18, 1982. On December 10, 1982, the General Counsel of the FLRA, by the Director of Region IV, issued a Complaint and Notice of Hearing.

The Complaint alleged that Respondent violated Sections 7116(b)(1) and (8) of the Statute by failing to fairly represent Evans in a grievance procedure. An Amended Complaint issued August 4, 1983, added that Respondent acted arbitrarily, capriciously and in a grossly negligent manner. Respondent filed a Motion for Summary Judgment on January 31, 1983, but the Chief Administrative Law Judge of the Authority denied the motion on March 10, 1983. Respondent filed an Answer denying that it had violated the Statute.

A hearing was held before the undersigned, in Norfolk, Virginia at which Respondent and the General Counsel of the FLRA appeared, adduced evidence, and examined and cross-examined witnesses. Parties were given an opportunity to argue orally and briefs were filed by Respondent and the General Counsel of the FLRA which have been carefully considered. Based upon the record, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Facts

The Union is the exclusive collective bargaining representative of a unit of employees at the Naval Air Rework Facility, Norfolk, Virginia (hereinafter called NARF). The collective bargaining agreement between the Union and NARF, which became effective on or about June 29, 1978, provides for a grievance procedure in Article XXV. Evans, a member of the bargaining unit represented by the Union, worked as a machinists from April 20, 1981, until April 5, 1983, when he was removed from employment.

On April 6, 1982, NARF issued a notice of proposed suspension to Evans for unexcused tardiness, sleeping on duty, and delay in carrying out instructions of a supervisor. The Union's Chief Steward, Johnnie Rascoe, prepared a memorandum dated April 21, 1982, to the Power Plant Division Director, Emory Dixon, which denied these charges and requested a meeting. The memorandum also requested Rascoe's attendance at all meetings concerning the proposed suspension.

NARF granted a hearing on the proposed suspension, to be held on April 23, 1982. The afternoon or morning prior to the hearing, another Union steward, Mr. Scott, informed Evans that Rascoe was on leave and that he (Scott) would represent him at the hearing. When Scott was unable to present the facts correctly at the hearing, Evans was granted permission to represent himself orally and with written statements and documents.

By letter dated May 27, 1982, NARF informed Evans that it reduced the suspension from eight to five days and sustained the charges of unexcused tardiness and delay in carrying out instructions of a supervisor. An attachment to the letter stated that Union members have thirty calendar days after receipt of the letter to file a grievance.[1] Evans received the letter on June 4, 1982, the Friday before the Monday when his suspension was to begin; thus, the deadline for filing the grievance was July 4, 1982.

Upon receipt of the notice of the decision to suspend, Evans informed Rascoe that he wanted to appeal. Rascoe replied that they would take care of the matter after the suspension. Evans served his suspension from June 7 through June 11, 1982, and was out sick from June 14 through June 18, 1982. On or about June 21 or 22, 1982, Evans saw Rascoe talking with another employee and asked him to stop at his work area to discuss the grievance. He made this request on several subsequent occasions, but Rascoe never stopped by. Evans later spoke with his Union steward, Lloyd Pickett, and asked him to make sure that the appeal had been filed, and if not, to file it. Pickett replied that he would check.

On or about July 6 or 7, 1982, Evans saw Rascoe during a break and asked him about the appeal. Rascoe said "I have been meaning to talk to you on that," and asked about the letter of suspension. Rascoe counted the thirty-two days that had passed and acknowledged that it was too late to file a grievance. Evans was limited in his ability to contact Rascoe because Evans could not take off from work to find him, and because Rascoe worked unusual hours because of his Union activities.[2]

NARF informed Evans in a notice of decision on proposed removal dated March 30, 1983, that he would be removed from employment, effective April 5, 1983. Evans' previous disciplinary record, including the suspension presently at issue, was considered in this decision.

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[1] In its answer to the complaint, Respondent asserted that the time period for filing a formal grievance is three days from the date of the informal hearing. At the hearing, the Union Business Representative admitted that the grievance processing information included in Evans' notice of suspension was correct.

[2] I reject Respondent's contention that Evans never approached it for representation after the April 23, 1982 hearing. Respondent's only evidence on this point is testimony by Russell Hurdle, Business Representative for District Lodge 74 of the Machinists Union, Respondent's representative in unfair labor practice cases. According to Hurdle, Rascoe stated that he tried unsuccessfully on several occasions to contact Evans because "he wanted to make sure that the employee was not disturbed", and "to determine what he wanted to do with the case", and that Evans was never working. These hearsay statements, made during the investigation of this case, are insufficient to rebut Evans' firsthand detailed account of the events. In addition, applications for leave, in evidence, reveal that Evans took no annual or sick leave between June 21 and July 1, 1982.

Discussion and Conclusions

The record establishes that although Evans repeatedly sought assistance from the Union in appealing his suspension, the Union failed to file a timely formal grievance on his behalf. In addition, the Union's assurances that it would handle the matter misled Evans so that he could reasonably conclude that the Union would file a grievance on his behalf. The General Counsel argues that illegal motivation or other intentional misconduct is not necessary to establish a breach of the duty of fair representation. I disagree with this contention, but conclude that Respondent did breach its duty of fair representation, in violation of Sections 7116(b)(1) and (8) of the Statute.

In Vaca v. Sipes, 386 U.S. 171 (1967), the Supreme Court established that a union breaches its duty of fair representation when its conduct towards a member of its collective bargaining unit is arbitrary, discriminatory or in bad faith. In declining to broaden the meaning of this standard, I adopt Judge Dowd's reasoning in National Federation of Federal Employees, Local 1453, OALJ-83-52, Case No. 4-CO-20022, March 23, 1984, pending before the Authority (hereinafter NFFE). In NFFE, Judge Dowd found that the Union had not failed in its duty to fairly represent an employee because there was no evidence that the union "deliberately and unjustifiably" failed or refused to refile a grievance.

Absent the necessity of such a showing of intentional misconduct, the burden on labor organizations would be unreasonable. Union officials are not professional advocates and should not be held to the same standard as attorneys. See Tidewater Virginia Federal Employees Metal Trade Council/International Association of Machinists, Local No. 44, 8 FLRA 217, 231 (1982); American Federation of Government Employees, AFL-CIO, Local 987, 3 FLRA 715, 721 (1980). In the public sector, in particular, where unions cannot compel the payment of dues, a broad standard with respect to the duty of fair representation would imperil the very existence of labor organizations and ultimately defeat the purposes and policies of the Statute. Employees dissatisfied with the quality of a union's representation can express this dissatisfaction by voting for new union officers or by decertifying the union. In addition, federal employees have the right to present a grievance on their own behalf under Section 7121(b)(3)(B) of the Statute. See NFFE, supra.

In the instant case, however, Respondent's unexplained failure to file Roy G. Evans' grievance creates an inference of intentional misconduct. Evans approached Chief Steward Rascoe, immediately after receiving the letter of suspension requesting that a grievance be filed and Rascoe reassured Evans but postponed further discussion until after the suspension. After returning to work more than two weeks later, Evans asked Rascoe on several occasions to see him at his work station, so they could discuss the grievance. Rascoe never contacted Evans. In addition, Evans asked another Union steward to make sure the grievance had been filed and, if not, to file it. That steward too did not re-contact Evans. Finally, approximately two weeks after returning to work and continuously seeking Union assistance, Evans confronted Rascoe, who acknowledged that it was then too late to file the grievance.

Under these circumstances, absent evidence to rebut the clear inference of intentional misconduct, I must conclude that Respondent's agents intentionally chose to ignore Evans' requests. The record fails to establish that ignorance of the applicable grievance procedure explains the Union's idleness, as it did in NFFE, supra p. 4, at 24, fn. 22.[3] In view of Evans' repeated attempts at securing assistance over approximately a four-week period, Rascoe is presumed to have known that the time limit for filing the grievance was approaching, even if he did not remember the exact date. Yet, Rascoe failed to inquire about the date until it was too late, even though Evans, on a number of occasions, sought to talk to Rascoe about the grievance. Further, I reject the contention that Rascoe simply forgot to stop by Evans' work area after each attempt by Evans at consultation. After returning to work, Evans approached Rascoe several times during a two-week period. Where it is implausible, as here, that the Union inadvertently mishandled a grievance, intentional misconduct should be imputed to the Union.[4]

In light of the foregoing, I conclude the Union breached its duty of fair representation under Section 7114(a)(1) of the Statute by handling Evans' grievance in an arbitrary and discriminatory manner and, accordingly, it violated Sections 7116(b)(1) and (8) of the Statute.

Remedy

The General Counsel urges that Respondent should be ordered to cease and desist its illegal activities, and to take affirmative action to make Evans whole for wages lost during his period of suspension. The governing principle under Vaca v. Sipes, 386 U.S. at 197, is to apportion liability between the employer and the union according to the damages caused by the fault of each. Unlike the court proceeding in Vaca, this proceeding does not resolve Evans' charges against NARF. Since NARF's liability is uncertain due to the Union's mishandling of the grievance, the uncertainty must be resolved against the Union. Abilene Sheet Metal, Inc. v. NLRB, 619 F.2d 332, 348 (5th Cir. 1980); See also Service Employees International Union, Local No. 579, AFL-CIO, (Beverly Manor Convalescent Center), 229 NLRB 692 (1977); Contra Service Employees International Union, Local 556,

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[3] At the hearing, the only evidence adduce by Respondent was hearsay testimony that Evans never approached Rascoe after the hearing. In its brief, however, Respondent argues that assuming, arguendo, that Evans did seek assistance, Rascoe forgot the deadline.

[4] See National Federation of Federal Employees, Washington, D.C., OALJ-84-84, Case No. 4-CO-20019, at pg. 8, July 5, 1984, pending before the Authority, wherein the Administrative Law Judge concluded that the union's failure to attend a Merit Systems Protection Board hearing would violate the duty of fair representation absent a showing of good cause to excuse or explain the absence.

AFL-CIO, OALJ-83-59, Case No. 8-CO-37 and 38, February 28, 1983, pending before the Authority. A party should not benefit from its own misconduct to the detriment of another. Accordingly, it is recommended that the Authority order Respondent to seek permission from NARF to file a late grievance and pursue the grievance in good faith and with all due diligence;[5] however, if NARF refuses to grant such permission, it is recommended that the Authority order Respondent to make Evans whole for the wages lost during his period of suspension.

Based on the foregoing, it is recommended that the Authority adopt the following:

ORDER

Pursuant to Section 7118(a)(7) of the Statute, it is ordered that the International Association of Machinists and Aerospace Workers, Local 39, AFL-CIO:

1. Cease and desist from:

(a) Affording on an arbitrary basis differing standards of employee representation to employees in units of exclusive representation.

(b) Interfering with, restraining or coercing any employee in the exercise by the employee of any right under the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to carry out the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Represent all bargaining unit employees on an equal basis and with the same standard of representation.

(b) Seek permission from the Naval Air Rework Facility, Norfolk, Virginia (NARF), to file a late grievance concerning the May 27, 1982 suspension of Roy G. Evans and pursue the grievance with good faith and all due diligence.

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[5] In Tidewater Virginia Federal Employees Metal Trade Council/International Association of Machinists, Local No. 44, 8 FLRA at 218, the Authority struck down, in part, such an order to seek permission to file a late grievance, but did not indicate that this relief would always be inappropriate.

(c) If NARF refuses permission to file a late grievance concerning the May 27, 1982 suspension of Roy G. Evans, pay Evans the amount of earnings lost during the period of suspension, June 7, 1982 through June 11, 1982.

(d) Post at the Naval Air Rework Facility, Norfolk, Virginia, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by a responsible Union official and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices are customarily posted. Reasonable steps shall be taken by the Union to ensure that such notices are not altered, defaced, or covered by any other material.

(e) Pursuant to 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IV, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: October 5, 1984
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT afford on an arbitrary basis differing standards of employee representation to employees in units of exclusive representation.

WE WILL NOT interfere with, restrain, or coerce any employees in the exercise of any right under the Federal Service Labor-Management Relations Statute.

WE WILL represent all bargaining unit employees on an equal basis and with the same standard of representation.

WE WILL seek permission from the Naval Air Rework Facility, Norfolk, Virginia (NARF), to file a late grievance concerning the May 27, 1982 suspension of Roy G. Evans and pursue the grievance with good faith and all due dilgence.

WE WILL pay Roy G. Evans the amount of earnings lost during the period of suspension, June 7, 1982 through June 11, 1982, if NARF refuses permission to file a late grievance concerning Evans' May 27, 1982 suspension.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

(24 FLRA No. 39)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region IV, whose address is: 1776 Peachtree Street, N.W., Suite 501 - North Wing, Atlanta, Georgia 30309 and whose telephone number number is: (404) 881-2324.